

*United States Court of Appeals  
for the Second Circuit*



**APPELLEE'S BRIEF**



76-7348

To be argued by  
ELIZABETH B. DuBOIS

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

-against-

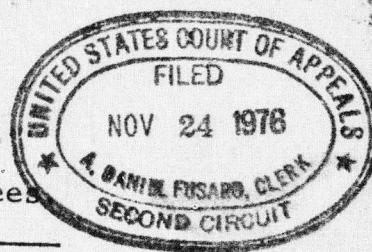
THE BOARD OF EXAMINERS,

Defendant-Appellant

-and-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK  
and the CHANCELLOR OF THE CITY SCHOOL DISTRICT,

Defendants-Appellees



On Appeal from the United States District Court  
for the Southern District of New York

BRIEF OF PLAINTIFFS-APPELLEES

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On Appeal from the United States District Court  
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BRIEF OF PLAINTIFFS-APPELLEES

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This is an appeal from an order of the district court entered July 7, 1976, modifying its previous order of March 25, 1975.

Plaintiffs and the defendant Board of Education join in urging this Court to affirm the order below. The only appellant is the defendant Board of Examiners, a subordinate arm of the Board of Education.

The Board of Education joins with plaintiffs in the position set forth in this brief as indicated in the Board's Brief, with the limited exception therein described.

#### INTRODUCTION AND SUMMARY

The only issue on appeal is whether the district court (Pollack, J.) erred in approving a permanent system for the selection of school supervisors proposed by defendant-appellee Board of Education -- the body responsible for administration of the City's school system.

Since the Board of Education's proposed system has been consented to by plaintiffs, affirmance of the order below should finally end this litigation that has consumed the time of the parties and the courts for over six years, resulting in dozens of district court hearings, <sup>1/</sup> eight appeals to and four decisions by this Court, <sup>2/</sup> and two petitions for certiorari in <sup>3/</sup> the United States Supreme Court.

Since the Board of Education's proposed system is capable of immediate implementation, it would accomplish the goal urged on the parties by this Court and the district court for many years -- establishment of a permanent selection system to replace the interim systems that have operated since the defendants' old examinations were preliminary enjoined in 1971.

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1/ The district court docket sheet is seventeen pages long. Joint Appendix I-A-18a [hereinafter numbers followed by "a" refer to volume and page of the Joint Appendix].

2/ 2d Cir. Nos. 71-2021 [458 F.2d 1167 (1972)]; 73-2320, 73-2476 [496 F.2d 820 (1974)]; 74-1334 [497 F.2d 919 (1974) (dismissed without opinion)]; 75-7161, 75-7164 [534 F.2d 993, 1007 (1976)]; 76-7348 and 76-7470 (both pending).

3/ U.S. Sup. Ct. No. 73-7046 [Cert. denied, 95 S.Ct. 123 (1974)]; No. 76-344 (pending petition by CSA on excessing issue on which CSA was granted rights of limited intervenor).

And finally and most important, as Judge Pollack found at the hearing below, the Board's proposed system appears designed to remedy the evils of the old examination system which prompted this litigation, by providing for nondiscriminatory and job-related examinations, suited for the selection of school principals and other supervisory personnel in this City's school system.

Reversal on either of the grounds urged by defendant-appellant Board of Examiners [hereinafter the Examiners] would, by contrast, perpetuate this litigation without warrant and for no conceivable benefit.

The Examiners argue first that the Supreme Court's decision in Washington v. Davis, 96 S.Ct. 2040 (1976), requires vacation of the Final Consent Judgment entered in this case in 1973, and dismissal of the case in its entirety. The 1973 Judgment is not, of course, the judgment here on appeal, nor was its validity raised below. That Judgment resolved the basic issues regarding liability and plaintiffs' right to relief, enjoining administration of defendants' old examination system and prohibiting administration of any new system without court approval. Those issues were resolved in a manner entirely consistent with Davis. And the doctrine of res judicata precludes reopening the issues resolved by the 1973 Judgment in any event. Finally, the constraints imposed by the Davis decision into an "instrument of wrong," imposing the kind of hardship and oppression justifying modification of a final decree. Those constraints consist solely of prohibiting the Examiners from re-instituting an examination system

concededly unlawful under present standards of law, and from instituting any allegedly new system without court approval.

But even if this Court could vacate the 1973 Judgment it could not grant the Examiners the relief sought -- dismissal of the action. The only relief appropriate would be to reopen the case and permit the parties to relitigate the legality of the old examination system -- a system that has been enjoined since 1971 and that is clearly unlawful. Dismissal would be impermissible not only because it would deny plaintiffs the chance to establish their right to relief, but it would deny others the chance to challenge the relief already granted. If the Examiners were right that Davis undermined the validity of the 1973 Final Consent Judgment, then the validity of the relief granted pursuant to that Judgment (and the previous preliminary injunction) is necessarily in question. That relief has involved the permanent licensing and/or placement of thousands of supervisors.<sup>4/</sup> While the Examiners say they have no interest in unraveling the relief granted to date (Brief p. 27 fn.\*\*), those persons who would have obtained licenses and jobs but for that relief may well.<sup>5/</sup> The Examiners cannot waive their rights. The case

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<sup>4/</sup> Over 1100 supervisors have received permanent licenses to date pursuant to the 1973 Final Consent Judgment (I-C-696a); many others have received appointment on an acting or provisional basis, or their placement has been effected by the district court's various orders regarding transfer and excessing rights of persons licensed pursuant to the old system as compared to others not so licensed. See, e.g., 7 CCH Emp.Prac.Dec. ¶9084 (1973); 534 F.2d 993, 1007(1976).

<sup>5/</sup> Indeed this is illustrated by the fact that the supervisory union, the Council of Supervisors and Administrators [hereinafter CSA], has petitioned the Supreme Court for certiorari (and filed appeal No.76-7470 in this Court) challenging this Court's previous decision regarding excessing rights, on behalf of its members.

would therefore have to be relitigated and for no purpose since, as demonstrated infra, there can be no doubt but that plaintiffs would prevail. It is exactly this kind of waste, as well as the uncertainty and potential for chaos in the school system were the Examiners to prevail on this appeal, that the doctrine of res judicata was designed to prevent.

The Examiners' other argument is that the court below should have refused to approve the Board of Education's proposed plan for a permanent supervisory selection system [hereinafter the 1976 "Modified Plan"] and forced the Board to implement an earlier plan proposed by it together with the Examiners [herein-after the 1975 "Original Plan"]. (This is the nomenclature used below. The Examiners refer in their brief to the two plans as, respectively, the "Revised Plan" and the "Permanent Plan".)

This argument relates solely to a question of the relief found appropriate pursuant to the 1973 Judgment. Questions regarding relief are entrusted to the broad discretion of the district court, and here there can be no question but that the court's exercise of discretion was appropriate.

The 1976 order approving the Modified Plan did not mandate defendants to do anything, any more than did the 1975 order approving the Original Plan. Both orders simply permitted defendants to develop a new permanent selection system. Clearly it was proper to permit the defendant Board of Education, which has plenary power over the City school system, to go forward with the plan that it had decided by 1976 was best designed to produce a nondiscriminatory and job-related selection system. Indeed it

would have been improper for the court to force the Board to implement its earlier plan unless this appeared necessary to provide plaintiffs the relief to which they were entitled under the 1973 Judgment. The only other question for the court was whether the Board's proposed plan violated state law as argued by the Board's subordinate arm, the Examiners. The court below resolved any possible questions as to the plan's legality under state law by requiring that it be amended to ensure that the Examiners had complete control over the design and administration of the examinations called for by the Plan. As amended the plan was virtually identical to the interim examination system upheld by this Court on a previous appeal as satisfying state law requirements. The court then had no choice but to approve the plan. To do otherwise would have constituted unwarranted intervention by a federal court in a local board of education's affairs.

The 1976 Modified Plan provides for a two-step examination process. An "unassembled examination" at Step 1 will determine whether candidates satisfy certain education and experience requirements and are entitled to provisional appointment. An evaluation of actual performance on the job at Step 2 will determine whether candidates have in fact the qualities necessary for successful performance and are entitled to receive licenses and permanent appointments. This emphasis on on-the-job performance evaluation as the central and ultimate criterion of success or failure is the key to the Modified Plan, as it was to the Original Plan. (Significantly the Examiners ignore throughout their Brief

both the existence of the key Step 2 on-the-job evaluation, and the fact that Judge Pollack's amendment of the Plan gave them the full examining power at this as well as Step 1.)

Acceptance of the Examiners' argument that the Original Plan should be implemented would again totally undermine the goals of promptly ending this litigation and establishing a permanent and lawful selection system. The main difference between the Original and the Modified Plans is that the Original called for elaborate additional screening tests at Step 1, and for job analyses to be conducted as a basis for developing these tests. It is difficulties in preparing these screening tests, which serve little real purpose in light of the ultimate on-the-job performance test, that stymied implementation of the Original Plan. The job analyses developed by the Board of Education's experts pursuant to the Original Plan were found by the Board to be an invalid basis for developing legal Step 1 tests. Thus the Board of Education would have to begin anew to implement the Original Plan. Since that plan has been in effect since March, 1975 and has produced nothing to date, and the Board of Education does not believe that plan is capable of producing a viable system, it is difficult to believe that an order to implement it will be anything but futile. At best it would take several months to develop adequate new job analyses, and additional months to develop the elaborate Step 1 tests called for by that plan. The Modified Plan would involve none of this delay.

And if the Original Plan were to be implemented there can be little doubt but that the examination system thereby

instituted would be the subject of the same kind of litigation that has engulfed the courts for the past six years. Indeed one of the Board of Education's main reasons for proposing the Modified Plan was its concern that the Original Plan was not likely to produce a nondiscriminatory and job-related system,<sup>6/</sup> and therefore that it would be subject to legitimate court challenge.<sup>7/</sup>

The Examiners' appeal must be seen as simply a last desperate attempt to reinstitute the kind of examination system they seem inalterably wedded to -- a system which maximizes their power and prestige but which has little to do with the selection of the most qualified supervisors.<sup>8/</sup> Virtually all those concerned

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6/ Counsel for the Board stated at the hearing below:

...changed circumstances since March of 1975 have demonstrated that the original plan has little likelihood of achieving its primary goal, which is to develop a non-discriminatory and job-related supervisory selection system.

I-C-892a.

7/ Counsel for the Board stated at the hearing below:

What we are trying to avoid is a repeat of years and years of litigation of the old system or similar systems to the old system....

I-C-883a

It [the Board of Education] just can't allow the Board of Examiners to prepare exams in a vacuum and then, five years from now to have a new Chance lawsuit.

I-C-886a.

See generally I-C-884-86a.

8/ As counsel for the Board of Education pointed out in the hearing below:

I think that it is true that under Step 1 we give them [the Examiners]...less jobs and probably less work to do than they would like, and I think that (footnote continued next page)

with educational reform are agreed on the importance of reducing reliance on traditional written tests and making performance evaluation the major component of any supervisory selection system,  
<sup>9/</sup> as it is in the Modified Plan. The Examiners clearly see this as a threat to their role, apparently because they are unable to conceive of any real tests other than the pen and paper tests they have traditionally administered. Despite the Examiners' talk of a "new" system, the fact they condemn the Board of Education for its failure to adopt invalid job analyses as the basis for that new system demonstrates that they have not even begun to

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(footnote continued)

is their basic problem here.

But I think that the City School District, its needs, the need to end this litigation -- that has to become and should be paramount and not the desire of the Board of Examiners to have a lot of jobs and prestige and work for themselves.

I-C-891a.

9/ See, e.g., "Memorandum Regarding Reform of Personnel Selection Procedures for New York Public School System by Establishment of a New Two-Step Performance-Based Certification System," September 15, 1973, prepared by the Public Education Association, previously submitted to this Court as Appendix A to plaintiff-appellees' brief on appeal No. 73-2320. This memorandum analyses more than a dozen authoritative studies of the City schools' personnel selection system, made over the past twenty years, all of which called for substantial reform. It notes

...[O]n-the-job performance evaluation is a key element of the reform proposals urged in many of the major studies reviewed in...this memorandum. Performance evaluation should be a keystone in whatever new system of selection, appointment, and licensing is to be enacted for the future. (p. 29)

See also Trachtenberg Aff., I-C-711a, 773a; Christen Aff. ¶32, I-C-965-66a.

understand or accept the necessity for change.<sup>10/</sup> The Examiners' intransigence is further demonstrated by their request that the injunction prohibiting administration of their old examinations be lifted because it "would indefinitely enjoin defendants from pursuing methods of testing which are perfectly valid and legal."  
(Examiners' Brief p. 27).

It is significant in this connection that the Examiners have failed to reform the examinations used to select teachers, which are comparable in nature to the supervisory examinations outlawed in Chance. And the Office for Civil Rights of the Department of HEW has just recently informed the Board of Education that the City School System's teacher selection procedures are racially discriminatory and non job-related, and therefore that the school system is in non-compliance with Title VI of the Civil Rights Act of 1964 (judged by standards identical to those applicable under Title VII).<sup>11/</sup>

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10/ Thus here as in the court below the Examiners condemn the Board for failing to adopt the job analyses developed by its consultants as the basis for development of new supervisory examinations. (Brief pp. 5-6, 14, 81) But the Board had concluded, by the very process of consultation mandated by the Original Plan, that those job analyses were inadequate and could not be used as the basis for developing a valid, job-related examination system. See p. 20 n. 20 infra.

11/ See generally report by letter of Martin H. Gerry, Director, Office for Civil Rights, to the Chancellor, dated November 9, 1976. That report, resulting from "the most comprehensive review ever undertaken by the Office for Civil Rights," concludes that the New York City school system has "denied minority teachers full access to employment opportunity through the use of racially discriminatory selection and testing procedures." (p. 1) See also pp. 2, 4, 5-6, Appendices C, D, G, H.

A federal lawsuit challenging the teacher tests as racially discriminatory and non job-related has also been filed. I-C-886a.

Judge Mansfield struck down the Examiners' old supervisory examination system as totally unfit. He and two successive district court judges -- Judges Tyler and Pollack -- resisted attempts by the Examiners to reinstitute their old examination system, or allegedly "new" systems sharing its characteristics.<sup>12/</sup> This appeal must be seen as simply one in a series of similar attempts, and the Examiners' request that this Court reverse the district court's previous decisions denying such attempts must be rejected out of hand.

The Examiners stand alone in their resistance to development of a reformed selection system, as they have throughout this litigation. When suit was filed, the Chancellor of the City School System stated that he would not defend because to do so:

...would require that I both violate my own professional beliefs and defend a system of personnel selection and promotion which I no longer believe to be workable.

458 F.2d 1167, 1169 (1972), quoting from 330 F.Supp. at 219-20.

The Board of Education also failed to defend the old examination system either on the district court level or on appeal. Ibid. Counsel for the Board below characterized the Examiners' old

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<sup>12/</sup> The Examiners' attempts to implement allegedly "new" or reformed examination systems were twice rebuffed by Judge Mansfield: II-251-55a; I-A-83-124a. The Examiners refused even to implement the on-the-job performance examinations mandated by the 1973 consent judgment until forced to do so by Judge Tyler after plaintiffs had brought two separate motions for compliance. See plaintiffs' proposed order and supporting papers dated April 1 and 9, 1974; Order dated April 15, 1974, modifying the July 12, 1973 Orders; plaintiffs' motion for contempt and alternate relief and supporting memorandum, dated December 3, 1974; Dec. 17, 1974 hearing, Tr. pp. 23-27.

system as "totally irrelevant to the needs of the school system" (I-C-885-86a), and made it clear that the reason for the Board of Education's Modified Plan was its concern that the Original Plan would simply allow the Examiners to perpetuate that kind of system. (I-C-883-86a)

The Board of Education has now assumed responsibility that it had previously abdicated but that is its under state and federal law -- that of determining the qualifications for which supervisors are to be tested,<sup>13/</sup> and of assuring that its supervisory selection system is nondiscriminatory and job-related. Pursuant to that responsibility it has developed a plan that promises finally to provide the City school system with a method designed to select the best qualified supervisors. Plaintiffs have consented to this system and the court below has found that it does in fact appear designed to remedy the evils inherent in the old system.

This Court's only role is to determine whether Judge Pollack's order approving the Board of Education plan, as amended to comply with state law, violates federal law or constitutes an abuse of a district court's discretion regarding relief. As demonstrated below, the court's order comports with federal law and constitutes entirely appropriate relief.

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<sup>13/</sup> One of the allegations in plaintiffs' complaint was that the old examination system violated state law because the Board of Education had failed to establish such qualifications and had unlawfully delegated its responsibility for the examination system to the Examiners. See Amended Complaint ¶28 and prayer for relief ¶¶(a) and (c), II-152-54a.

ISSUES FOR REVIEW

1. Does the Supreme Court's decision in Washington v. Davis, 96 S.Ct. 2040 (1976), require reopening the issue of liability resolved by the Final Consent Judgment entered in 1973?
2. Does the district court's 1976 order approving a plan for establishment of a permanent system for the selection of supervisors proposed by defendant Board of Education constitute an abuse of discretion regarding relief, where the Board of Education is the body with plenary responsibility for that system, where the court modified that plan to ensure that it accorded the Board's subordinate agency, the Examiners, authority to design and administer the tests called for by that system, and where plaintiffs have consented to the order?

COUNTER-STATEMENT OF THE CASE

This suit was filed in September of 1970. Plaintiffs challenged the legality of the system of selecting school supervisors administered by the defendant Board of Education and the defendant Examiners. The challenge was based on allegations, inter alia, that defendants' examinations were racially discriminatory and were not job-related but, rather, constituted an irrational method of selecting school supervisors, designed to prevent rather than promote selection of the best qualified. Plaintiffs charged that the system accordingly violated federal law (42 U.S.C. §§1981 and 1983), as well as state statutory and

constitutional provisions. See generally Amended Complaint, II-139-54a.

Plaintiffs' motion for preliminary relief resulted in litigation on two of the issues raised -- (1) the discriminatory impact of defendants' examinations, and (2) their rationality. On the basis of an extensive record,<sup>14/</sup> then district Judge Mansfield granted preliminary relief in July of 1971. 330 F.Supp. 203 (1971); II-179a. He found that the examinations had a significant discriminatory impact, were not job-related and accordingly violated the Equal Protection Clause of the Fourteenth Amendment. He did not reach the other issues raised, including the state law claims. 458 F.2d 1167, 1169 n. 3 (1972).

Judge Mansfield entered a preliminary injunction (II-257-59a) prohibiting defendants from continuing to administer their old examination system, and providing that no new system could be implemented except upon order of the court, which order could be issued upon motion by "any party". The injunction also provided for an interim system whereby applicants for school supervisory positions who satisfied educational and experience qualifications established by the Board of Education could be appointed on an acting basis without regard to whether they held licenses granted pursuant to the old system.

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<sup>14/</sup> The record on these issues was equivalent to that which would have been produced at trial, involving "a plethora of lengthy affidavits and exhibits, a hearing at which oral testimony was taken, a series of arguments, and extensive briefing of the law and facts by the parties." 330 F.Supp at 207; II-183a.

This Court (Feinberg, J.) upheld the grant of preliminary relief in April of 1972 on the ground that the old examination system failed to satisfy even the most lenient Equal Protection standard since it bore no rational relationship to any legitimate state purpose. 458 F.2d 1167 (1972). The Examiners did not petition for certiorari, nor did they request a trial on the merits.

Extensive negotiations led to a Stipulation of Settlement (I-A-125a) and in July of 1973 to the Final Consent Judgment between plaintiffs and defendant Examiners (I-A-250a). This Judgment settled the fundamental issue of liability and right to relief.<sup>15/</sup> It permanently enjoined defendants from administering their old examination system (I-A-252-53a at ¶11), and it provided the plaintiff class with two other forms of relief: (1) a revised interim selection system pursuant to which supervisory applicants would be licensed and appointed based on an evaluation of their on-the-job performance, pending establishment of a permanent new system (I-A-254-55a at ¶¶III C, V); and (2) a prohibition against the institution of any permanent new system by defendants without their having first attempted to agree upon a system with plaintiffs and having obtained court approval.

The Judgment made clear that development of the permanent new selection system was to be the subject of negotiations

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<sup>15/</sup> The Stipulation was "to finally resolve the issues raised in this action with respect to past supervisory examination procedures..." (I-A-128a). It provided that the judgment entered pursuant thereto would "be clothed with finality, pursuant to Rule 54(b)...." (I-A-137-38a).

by the parties and was ultimately subject to the further jurisdiction of the court. Thus the Stipulation of Settlement referred to the fact that plaintiffs and defendants had "established a task force consisting of their representatives to continue discussions aimed at developing and recommending a new comprehensive supervisory selection system," and the settlement contemplated "the development of such a new comprehensive selection system" by this joint plaintiff-defendant task force. (I-A-127a, 128a) And the Judgment provided that if the parties were unable to agree upon a plan for a new permanent selection system, "any party" would be free to apply for an order permitting implementation of a new system, but only provided that first information had been exchanged and an attempt to reach agreement made, as had been required under the preliminary injunction. (See I-A-252-53a at ¶¶III, IX-X; Compare II-259a.)

The Board of Education objected to the Consent Judgment because of its concern with that Judgment's establishment of an interim licensing system. A modified preliminary injunction was entered binding the Board to all the provisions contained in the Consent Judgment. (I-A-260a). The Board appealed from that injunction and this Court affirmed ruling, inter alia, that the on-the-job performance evaluations contemplated by the interim licensing system constituted examinations that satisfied all state law requirements. 496 F.2d 820 (1974).

The Board of Education subsequently agreed to be bound by the 1973 Final Consent Judgment (I-B-508-09a).

Negotiations regarding the future examination system ensued but, contrary to the Examiners' claim (Brief pp. 10-11), the parties were not able to agree upon the nature of that system. They did agree to the outlines of a very general plan for the development of a new system. But plaintiffs made it clear that because the plan provided no guarantees as to the nature of the actual system that would emerge, they could only consent to the plan if the parties reached agreement on: (1) who was to perform certain key functions under the plan -- to-wit conduct of the job analyses and conduct of the validation studies; and (2) provisions relating to reporting, monitoring and court approval of the plan's implementation, that would enable plaintiffs and the court to determine whether the system that was developed complied with the requirements of law. The Examiners' characterization of these as issues of disagreement which "did not pertain to the nature and scope" of the future examination system (Brief p. 10 n.\*) is a total distortion of the facts. They were a source of endless dispute in negotiations, and at the time the Examiners submitted to the court, in May of 1974, the partial plan which omitted provisions regarding these issues, plaintiffs made it clear as they had throughout the negotiations that their agreement to any other aspect of the plan was premised on reaching agreement on these issues. They specifically did not, as the Examiners falsely claim (Brief p. 10), agree to submit these issues to the court for

16/ resolution as a separate matter. Since agreement could not be reached, the issue as to the nature of the plan for a future supervisory selection system had to be litigated. The defendants' plan was adopted over plaintiffs' objection in March of 1975. 17/ It was therefore not a consent order nor was it ever, again contrary to the Examiners' claim, "incorporated...as part of the Consent

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16/ Thus at the May 1974 hearing before Judge Tyler, when the partial plan was submitted, plaintiffs' counsel stated:

MRS. DU BOIS: ...It's plaintiff's position that this is an agreed upon part of an overall package that we would like to agree to. But that that package would have to contain several elements that we consider essential in any settlement. All that disturbed me was that your Honor seemed to imply that those three matters might be separable from this agreement.

THE COURT: No. If I said that, I beg your pardon. They have to be resolved.

MRS. DU BOIS: From our point of view, your Honor, plaintiffs have agreed to that plan to the extent it exists only on the basis of their understanding or hope that we could reach agreement as to two matters we consider essential.

\* \* \* \*

THE COURT: I certainly would agree.... Nothing that has been set forth here is binding you to anything.

I-A-276-78a.

17/ The parties had made cross-motions, with plaintiffs' motion indicating once again that the plan submitted was satisfactory to plaintiffs only if the two outstanding issues were resolved as urged by plaintiffs. (I-B-344a, 348-52a). Thus plaintiffs argued that the provisions regarding consulting firms and reporting requirements contained in defendants' proposed plan -- that which was adopted essentially unchanged by the court -- "abrogate the conditions on which plaintiffs originally agreed upon the Plan and violate both the Plan's intention and the July 12, 1973 Orders." (I-B-349a). After a hearing (I-B-459a-1-485a), the court granted defendants' motion and denied plaintiffs' (I-B-472a-85a; 487a, 508a). The Board of Education as well as plaintiffs made it clear below that the 1975 order was not entered by consent. See Christen Aff. ¶51 (I-B-600a); Silver Aff. ¶¶5,6 (I-C-649-50a).

Judgment" (Examiners' Brief p. 11), and indeed its language reflects the fact that it was the result of conflicting motions. (I-B-507-08a).

The plan approved by the court in 1975 -- the Original Plan -- provided for a two-step testing procedure. Job analyses conducted by outside consultants selected by the Board of Education were to determine the qualities to be tested for at Step 1. The Examiners were then to test for those qualities. The crucial element of the testing scheme however was Step 2, an on-the-job performance evaluation. Step 1 was designed solely to eliminate those who did not satisfy minimum qualifications, so as to allow community school boards maximum choice in selecting applicants on a provisional basis. The Step 2 test determined whether or not persons who had served on a provisional basis were to be licensed. <sup>18/</sup>

The significance of the issues on which plaintiffs and defendants differed was confirmed by the Board's experience in attempting to implement the Original Plan. The very first step of the Original Plan -- the conduct of job analyses -- which was performed by consultants chosen over plaintiffs' objection, failed to produce analyses adequate for the development of valid Step 1 tests. See n. 20 infra.

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<sup>18/</sup> Thus under the 1975 Original Plan Step 1 was to "result in the provisional licensing of all eligible except those who fail to meet levels of minimum acceptable performance," (I-B-513a) its purpose being simply "screening out the unqualified, consistent with the primary purposes of the Step 1 evaluation which are to ensure employing authorities the broadest possible choice among qualified applicants." I-B-527a. One of the major goals of the system was "to build in performance evaluation as a key component of the licensing process." I-B-514a.

The Board of Education moved in April of 1976 to modify the 1975 order approving the Original Plan, to permit it to implement a new selection system pursuant to a proposed Modified Plan.<sup>19/</sup> This motion was based on the grounds, inter alia, that (1) the Original Plan was not likely to achieve the goal of a nondiscriminatory and job-related supervisory selection system;<sup>20/</sup> and (2) the Modified Plan was not only capable of swifter and less costly implementation,<sup>21/</sup> but was better suited to the task of selecting

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19/ See generally I-B--581-613a; I-C-647-66a; I-C-765-79a; I-C-795-867a; I-C-877-93a; I-C-911-19a.

20/ See generally I-B-596a, ¶24; I-C-660-61a; I-C-774-76a; I-C-796a; I-C-800a; I-C-863-65a; I-C-884-85a, 892a. The job analyses conducted pursuant to the Original Plan were, in the view of the Board's experts and others who had the power to review them under the Plan, inadequate as a basis for the development of a valid examination system. (I-B-591a, 593a, 594-96a; I-C-648a, 654a, 659a). Accordingly they had to be rejected by the Board which, under the Original Plan, had final authority to determine whether they were acceptable. (The Examiners had no authority in this regard. "The decision of the Board of Education...shall be final." I-B-517a.) Moreover experience in attempting to do the analyses had demonstrated that the Original Plan was inherently flawed so that new analyses conducted pursuant to its mandate would also prove inadequate.

21/ Thus the Modified Plan provided for a system capable of virtually immediate implementation, whereas implementation of the Original Plan would have required the Board of Education to conduct new, time-consuming job analyses and then the Examiners to develop elaborate Step 1 examination procedures based on those analyses, a delay of many additional months and perhaps years. Christen Aff. ¶¶6-8, 11(a), 12-24, 53, 55 at I-B-591a, 592-93a, 594-96a, 600a, 601a; Silver Aff. ¶11 at I-C-648a, 652a.

The enormous savings in costs represented by the Modified Plan was demonstrated by the Christen Aff. ¶¶11(b), 22, 30-32 at I-B-591a, 593-94a, 506a, 507a; and the Silver Aff. ¶¶11-12 at I-C-648a, 652-53a.

22/

the best qualified supervisors for the City's schools.

The Board's proposed Modified Plan (set forth at I-B-583-90a) retained the essential elements of the 1975 Original Plan, but simplified it significantly. Step 2 remained the crucial step, with on-the-job performance to determine licensure. Step 1 remained designed to provide community boards with maximum choice among candidates satisfying basic qualifications. The key difference was that in the Modified Plan the Board of Education opted to define those Step 1 qualifications as the satisfactory fulfillment of certain objective educational and experience requirements, rather than the subjective requirements envisioned by Step 1 of the Original Plan. Accordingly a less elaborate testing scheme was required at Step 1.

Judge Pollack, after exploring thoroughly at the hearing below (I-C-867a-1-943a) the issues raised by the Examiners on this appeal, was persuaded that the Modified Plan was better designed than the Original Plan to accomplish the goals of the 1973 Final Judgment and the 1975 Order--development of a non-discriminatory and job-related selection system. Because of his concern that the new system satisfy state law requirements, he modified the Board's proposed plan to ensure that the Examiners

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22/ See Christen Aff. ¶¶9-11, 24, 49, 54 at I-B-591a, 593a, 596a, 597a, 600-01a; Silver Aff. ¶¶10, 13-15 at I-C-648a, 652a, 653-54a; Tractenberg Aff. ¶¶7-13, 16 at I-C-773-76a; 778-79a; Christen Aff. I-C-796a, 802a; Owens Aff. I-C-865-67a.

had full authority to design and administer the tests necessary to determine candidates' ability to perform at Step 2 as well as Step 1, thus eliminating the only possible question as to the new system's legality under state law. In his decision, which appears at I-C 929-31a, he found as follows:

The purposes of the 1975 order and judgment and the proposed modification are to assure a selection system free of discrimination in the determination of merit and fitness of candidates for school supervisors.

The conditions which brought on this protracted litigation should, of course, not be perpetuated by slavish adherence to the methodology contained in the March 1975 judgment.

There exists a reasonable possibility that those conditions might be embraced in the implementation of the 1975 plan as written. Even if that 1975 judgment were consensual, and it so appears to be at least in hybrid character, if its underlying objectives are capable of attainment by simpler, more practical means, less susceptible of controversy and unwitting perpetuation of past vices, the law allows\* (see below) the Court in its discretion to order its modification.

However, the state law allocates the function of examining candidates on the Chancellor's criteria to the Board of Examiners. They must be given the responsibility on Step 2. The new plan allocates the administration of Step 1 to the Examiners. Consequently if Step 2 as proposed is modified to give responsibility thereon to the Examiners, no legal prejudice inures to the Examiners from the change of the directives of the March 1975 judgment.

\* See e.g., *System Federation v. Wright*, 364 U.S. 642 (1961); *Chrysler Corp. v. United States*, 316 U.S. 556 (1942). [footnote by the court]

I-C-930-31a.

The Examiners requested reargument and pressed again the points made on this appeal. In response Judge Pollack noted that in amending the Board's Modified Plan he had satisfied any state law problem by giving "entire control over the examination process to the Board of Examiners," and that the system as amended was comparable to the interim examination system approved

by this Court in the 1974 appeal in this case as satisfying the requirements of state law (496 F.2d 820 (1974), supra p. 16). (I-C-942a). Thus having heard reargument the court adhered to its original decision granting the Board's motion for approval of the Modified Plan, as amended. I-C-931a, 942-43a, 945a.

On July 7, 1976 Judge Pollack entered his order approving the Modified Plan. The order and the Modified Plan it approved are set forth at I-C-947-58a. (The Examiners not only ignore entirely the changes made by Judge Pollack in the Board of Education's proposed plan, but they also cite throughout to the plan as originally proposed rather than the Modified Plan as amended and approved in the order here on appeal.)

It is that order that is here on appeal.

ARGUMENT

I

WASHINGTON V. DAVIS PROVIDES NO BASIS FOR REOPENING THE ISSUES RESOLVED BY THE FINAL CONSENT JUDGMENT OF 1973 AND RELIEVING DEFENDANT BOARD OF EXAMINERS OF THE CONSTRAINTS IT IMPOSED

Preliminarily it should be noted that the Examiners' entire first argument is directed to an issue not involved in this appeal. The validity of the 1973 Consent Judgment has no bearing on whether the court below was right in permitting the Board of Education to implement the Modified rather than the Original Plan. No question was raised below respecting the validity of the 1973 Judgment and the constraints it imposed. However

plaintiffs have briefed these issues so that this Court can finally dispose of them.

A. The Examiners' Request that the 1973 Final Consent Judgment be Vacated and This Case Dismissed in Its Entirety is Precluded by the Doctrine of Res Judicata

The Examiners' Argument I is written as if the 1973 Final Consent Judgment had not been entered, and the doctrine of res judicata did not exist. That Judgment, as noted supra p. 15 and n. 15, finally settled the basic issue of liability and right to relief, and was "clothed with finality, pursuant to Rule 54(b)".

The Examiners discuss Davis as if this was the appeal from the preliminary injunction entered in 1971. They rely primarily in their affirmative argument for vacation of the 1973 Judgment (Brief pp. 16-25) on cases supporting the obvious proposition that new decisional law that comes down while an appeal <sup>23/</sup> is pending is relevant to the appeal of the decision below.

The only other authorities cited by the Examiners also involve situations where there has never been any final adjudication of <sup>24/</sup> the issues raised. It is of course true that had Davis come

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<sup>23/</sup> All the cases relied on by the Examiners are contained in their p. 17 footnote. All but the last three of these cases stand simply for the proposition contained in the text above, and are therefore demonstrably irrelevant to the issue here.

<sup>24/</sup> The last three cases cited in the Examiners' p. 17 footnote are misleadingly characterized by them as supporting the proposition that "even though an appellate court may have previously decided an issue, if the law changed, it should reverse its initial decision during a subsequent appeal of the case." The cases themselves make clear that this is true only where the first appeal did not result in a final judgment granting or  
(footnote continued next page)

down while the appeal of the 1971 preliminary injunction was pending or otherwise prior to a final adjudication of the issues involved in that injunction, Davis would have been applicable to such an adjudication. (As demonstrated infra Arg. IB(1), Davis would not however have affected this Court's decision affirming the grant of preliminary relief since that decision was based on the very standards enunciated in Davis.)

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(footnote continued)

denying relief. None provide support for opening up a final judgment simply because on appeal of another order in the case, new law has come down which arguably relates to the first judgment. Thus in the first of these cases, Jones v. Schellenberger, 225 F.2d 784 (7th Cir. 1955), cert. denied, 350 U.S. 989 (1956), the Court of Appeals decided on a petition for rehearing that its previous decision had been erroneous. The previous decision had relied on an earlier appeal of an earlier order in the case as res judicata. The Jones court found that that earlier order was not final, since it was simply an early stage in an accounting proceeding and resulted in no affirmative relief but rather, simply a maintenance of the status quo. (225 F.2d at 789) Moreover the court indicated that even had the earlier order been final in some sense it would not become res judicata with respect to a subsequent stage in the same proceeding whose ultimate purpose was a final decree providing or denying relief. In Chance the 1973 Final Judgment obviously constituted the kind of decree that under Jones would be entitled to res judicata effect. The cases cited in Jones stand simply for the proposition that while a particular proceeding is sub judice in the sense that it is pending on appeal, new law is relevant to the appeal. In McCone v. Crane, 174 F.2d 646 (5th Cir. 1949), the second case relied on by the Examiners, there had never been a final judgment on the relief to be awarded. The circuit court had previously reviewed and remanded a decision denying relief. On the second appeal the circuit court modified its views as to the appropriate relief in light of a recent Supreme Court opinion and remanded again. All the decisions were clearly part of one proceeding and the earlier circuit court opinion was described simply as the "law of the case." In Perrone v. Pennsylvania R.R. Co., 143 F.2d 618 (2d Cir. 1944), the last case relied on by the Examiners, there had been no prior final judgment upheld on appeal. On the first appeal the court reversed. On the second appeal the court noted it was not bound by views on the law expressed on the first appeal since they constituted simply the law of the case.

However Davis is entirely irrelevant to this appeal.

This appeal involves simply the details of the relief to be accorded plaintiffs pursuant to the 1973 Judgment -- specifically, which of two proposed plans for new selection systems should have been approved for implementation by the court below in 1976. Plaintiffs' right to relief, including an injunction against administration of the old examination system and a prohibition against institution of any new system without court approval, was finally determined by the 1973 Final Consent Judgment.

That Judgment is res judicata as to all issues resolved <sup>25/</sup> therein. The only significant issue not there resolved was the nature of the future selection system to be developed by the parties and approved by the court.

The doctrine of res judicata demands that courts not open and reconsider final judgments in the light of any subsequent decision. The Examiners submit no authority -- and could not -- undermining this fundamental principle.

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25/ Consent judgments have full res judicata effect. See Stuyvesant Insurance Co. v. Dean Const. Co., 254 F.Supp. 102, 110-11 (S.D.N.Y. 1966), aff'd sub nom. Stuyvesant Co. v. Kelly, 382 F.2d 991 (2d Cir. 1967):

These commendable principles of res judicata operate with equal force where constitutional questions are involved. [citations omitted] And this is so even though the settlement culminating in the entry of judgment against Empire may have resulted from an erroneous view of the law by the parties, or indeed, from an incorrect decision....

See also Wallace Clark & Co. v. Acheson Industries, 394 F.Supp. 393, 396 & n.6 (S.D.N.Y. 1975), aff'd, 532 F.2d 846 (2d Cir. 1976).

The only exceptions to the general rule respecting the finality of judgments are set forth in Rule 60 of the Federal Rules of Civil Procedure, which provides for modification under limited circumstances. Significantly the Examiners fail entirely even to mention this rule in their brief. Indeed the only Rule 60 cases relied on in their Argument I are cited simply for the proposition that the Examiners' consent to the 1973 Judgment does not bar relief from that Judgment (Brief p. 25). But the Examiners have nowhere established any reason to provide relief from that Judgment. The Examiners' failure to discuss Rule 60 is understandable since, as demonstrated in Arg. IC below, it provides no basis for modification in the instant case.

B. Even Were the Court Free to Reopen the 1973 Final Consent Judgment and Reconsider the Merits of This and the District Court's Earlier Decisions Granting Preliminary Relief, Washington v. Davis Would Not Authorize Vacation of the 1973 Judgment, and Dismissal of the Action Would in any Event Not be Permissible

- (1) This Court's 1972 decision upholding the grant of preliminary relief was based on standards entirely consonant with Washington v. Davis

The Examiners' bald assertion that Washington v. Davis held that the Chance decisions regarding preliminary relief "had been erroneously decided" and "effectively reversed," is simply wrong. (E.g., Examiners' Brief p. 16)

The Supreme Court in Davis ruled only that insofar as various courts including this Court in Chance had "rested on or expressed the view" that disproportionate racial impact standing alone and without regard to discriminatory purpose triggered the

strict scrutiny Equal Protection test, the Court disagreed.<sup>26/</sup>

The Court did not rule that a finding of discriminatory purpose was necessary to make out an Equal Protection violation -- simply that it was necessary to trigger the strict scrutiny test. Where there is no showing of discriminatory purpose state actions must be judged by the more lenient rational relationship test. Thus the Court made clear that the examinations upheld in Davis were upheld specifically because the district court had found that they were rationally related to a legitimate state purpose and accordingly satisfied that test.<sup>27/</sup> Indeed it is unimaginable

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26/ 96 S.Ct. 2040 at 2049-50 and n.12, 2051. Thus the Court's opinion states:

Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida, 379 U.S. 184 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

\* \* \* \* \*

Both before and after Palmer v. Thompson, however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications.

96 S.Ct. at 2049-50.

(It was in this context that the court cited Chance and numerous other cases.)

27/ Thus the Court ruled:

...[T]he test is neutral on its face and rationally may be said to serve a purpose the government is constitutionally empowered to pursue.

\* \* \* \* \*

(footnote continued next page)

that the Davis Court could have intended, as the Examiners argue, that examinations such as those involved in this case, which have a discriminatory impact, must be upheld as constitutional unless a discriminatory purpose is shown. In cases where there is no evidence of racial impact, state actions are held to violate Equal Protection where they are not rationally related to a legitimate state purpose. <sup>28/</sup> The fact that such actions may in addition have a discriminatory impact cannot immunize them from constitutional scrutiny.

In the Chance preliminary relief decisions the examinations at issue were found to bear no rational relationship to any legitimate state interest. On appeal this Court found that they failed to satisfy the most lenient Equal Protection test. Accordingly those decisions -- were they open for reconsideration under Davis -- would have to be affirmed.

Plaintiffs had charged that defendants' examinations were without "any rational justification." (Amended Complaint

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(footnote continued)

The District Court's accompanying conclusion that Test 21 was in fact directly related to the requirements of the police training program was supported by a validation study, as well as by other evidence of record....

96 S.Ct. at 2051, 2053

28/ Thus tests and other criteria used to determine public employment rights have traditionally been struck down as violative of Equal Protection where they are not rationally related to the jobs at issue. See e.g., Armstead v. Starkville Municipal Separate School District, 461 F.2d 276, 279-80 (5th Cir. 1972); Foster v. Mobile County Hospital Board, 398 F.2d 227 (5th Cir. 1968); Conrad v. Goolsby, 350 F.Supp. 713 (N.D. Miss. 1972); Steven v. Campbell, 332 F.Supp. 102 (D.Mass. 1971).

¶25, II-151a; see also ¶23, II-150a) Judge Mansfield held specifically that the examinations' discriminatory impact was not sufficient to invalidate them if they appeared "reasonably constructive to measure knowledge, skills and abilities" needed -- language essentially identical to the standard applied by the Supreme Court in Davis (330 F.Supp at 214; II-201a). He found that the examinations were in fact not job-related and therefore did not satisfy that standard.<sup>29/</sup>

On appeal this Court agreed that the examinations were without rational justification:

The justification for any written examination must at least be...that using it is better than drawing names out of a hat. Staying with that perhaps over simple idea for a moment, the use of a test should achieve much more than that. Judge Mansfield found that the tests at issue here did not.

458 F.2d at 1175  
(emphasis added)

In considering the constitutional standards by which the examinations should have been tested, this Court specifically found it unnecessary to reach the issue resolved in Davis -- whether the compelling state interest test was appropriate in a case where there was demonstration of racially discriminatory impact, but no discriminatory intent. Noting that the Supreme Court had not yet resolved that question, this Court ruled:

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<sup>29/</sup> See generally 330 F. Supp. at 219-22; 223-24; II-213-19a; II-223a. He noted, inter alia, that the only research report relating to the validity of the examinations "showed that there was little or no correlation between success on the tests and job success...." 330 F. Supp. at 220; II-216a.

...the district court's decision may be upheld under the "more lenient equal protection standard" and so [we] find it unnecessary to reach this most difficult question. [citations omitted] To be sure, the district court stated that the de facto classification found was "constitutionally suspect" and that the Board was required to make a "strong showing" that its examinations can be "justified as necessary." 330 F.Supp. at 216, 223. Such language usually connotes application of the "compelling interest" test. But the court's actual analysis indicates that it never reached the point where application of that test would bring a different result from application of the rational relationship test. It is true that the court placed a heavy burden of proof on the Board -- properly so, as we have already indicated. But the proposition to be proved was only that the Board's examinations were job-related. As to that, the court concluded that the Board's procedures for insuring the basic content validity of its tests were inadequately implemented and that as a result the tests themselves did not measure what they purported to measure. In short the present examinations were not found to be job-related and thus are "wholly irrelevant to the achievement of a valid state objective." Turner v. Fouche, supra, 396 U.S. at 362, 90 S.Ct. at 541; see Reed v. Reed, 404 U.S. 71, 76-76, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). The court did not reach the issue whether--or even suggest that--if the written examinations were job-related the Board would still be required to demonstrate that no less discriminatory means of obtaining its supervisory personnel were available. [citations omitted] Had the court done that, the bite of the "compelling interest" test would apply....The Board, then, failed to meet its burden even under the rational relationship standard, which would be the least justification that the Constitution requires.

458 F.2d at 1177-78  
(emphasis added)

Thus this Court upheld Judge Mansfield's decision by applying the very standards that Davis indicates are now appropriate.

What the Supreme Court did in Davis was simply to disavow some of the dicta in the Chance preliminary relief decisions. Review of the decisions themselves makes it clear that they would have to be upheld even if they were properly subject to review at this time under the Davis standards.

- (2) Were the 1973 consent judgment to be vacated, the dismissal requested by the Examiners could not lawfully be granted; plaintiffs would be entitled to litigate the merits of their claims

Even if the 1973 Final Consent Judgment were to be vacated the Court could not provide the only relief requested by the Examiners in its Davis argument -- dismissal of the action. The parties would have to be placed in the positions they were in prior to entry of the Judgment and permitted to litigate the issues regarding the legality of defendants' old examination system. And plaintiffs would clearly prevail at such a trial on any one of a number of theories. They would presumably prevail under the Davis standard. But in any event there is no doubt, based on the district court's findings on the preliminary relief decision, <sup>30/</sup> that they would prevail under Title VII. Moreover plaintiffs

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<sup>30/</sup> In Davis the Supreme Court made it quite clear that under Title VII racial impact, without discriminatory purpose, is sufficient to trigger a "vigorous standard" of review comparable to the strict scrutiny Equal Protection standard. 96 S.Ct. at 2050.

Plaintiffs would clearly have the right to amend their complaint to make this a Title VII case, as they would have had defendants not entered into the Consent Judgment in 1973. Since negotiations regarding the Consent Judgment were culminating in 1972-73, there appeared to be no need to amend the complaint to add a Title VII claim when Title VII was amended to cover public employers. Had negotiations broken down and the case gone to trial in 1973, plaintiffs would clearly have amended to add a Title VII claim. In considering plaintiffs' later claim for attorneys' fees Judge Tyler specifically noted that: "Even though the complaint here was never amended to include a Title VII claim, it could have been...." 11 CCH Emp. Prac. Dec. ¶10,631 at 6648 (1975). (Judge Pollack's subsequent ruling granting plaintiffs attorneys' fees on reargument found that plaintiffs were not entitled at that time (February 11, 1976) to amend to make the case a Title VII case because they were not asking for substantive relief and because such relief would have been barred by the Consent Judgment. 11 CCH Emp. Prac. Dec. ¶10,721 at 6998-99.)

made numerous claims in their complaint that it was not necessary to reach for purposes of the preliminary relief decision, but which would provide wholly independent bases for relief. Thus plaintiffs alleged intentional discrimination in the administration of the examinations, and Judge Mansfield noted that even the limited evidence on this issue presented 'raises a 'serious and substantial question' as to whether discrimination against Blacks and Puerto Ricans is not being unconsciously practiced by white interview examiners." 330 F.Supp. at 223; 224; II-221a, 223a. Plaintiffs also alleged that defendants' selection system violated 42 U.S.C. §1981 and several provisions of state law which required, inter alia, "objective" examinations, designed to measure "merit and fitness," and which further required that the Examiners "periodically review the validity and reliability of examinations...." Amended Complaint ¶¶ 26-27, II-151a-52a; see generally ¶1, II-140a. There can be no doubt, again based on the preliminary relief decision findings, that the Examiners failed to satisfy the requirement that they review the "validity" of their examinations.

Forcing the parties to go through the exercise of a trial which would necessarily result in a finding that the defendants' old examination system was unlawful would be pointless.

There is neither authority nor justification for the Examiners' request that the action be dismissed. Their argument for dismissal amounts simply to an assertion that there is no need for injunctive restraints regarding implementation of their old examination system or any new one because they have allegedly

changed their ways. (Examiners' Brief pp. 27-32). There is no authority for the proposition that a case should be dismissed because the defendants promise to change their unlawful ways. Indeed even where defendants in fact change their ways as a result of the filing of a lawsuit dismissal is not warranted. Moreover here the evidence that the Examiners have not changed their ways is all too clear. See pp. 7-10, supra. In any event a decision regarding the need for an injunction would be for the <sup>31/</sup> district court on a remand for further proceedings.

C. The 1973 Final Consent Judgment Cannot be Vacated Pursuant to F.R.Civ.P. 60 Because the Constraints It Imposed simply Prohibit the Examiners from Administering an Unlawful Examination System, and are therefore in No Way Inequitable or Oppressive

The only authority for obtaining relief from final judgments is F.R.Civ.P. 60. As noted supra, the Examiners fail even to argue that they have satisfied the standards imposed by this Rule. Nor did they ever ask the district court for modification of the 1973 Judgment. Therefore this Court could not order that modification be provided, since modification of a final judgment is a matter for the district court in the first instance. If this Court sees any merit to a Rule 60 motion, the most it can do is permit the motion to be filed in the district court.

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<sup>31/</sup> The two cases relied on by the Examiners for dismissal by an appellate court are totally inapposite. See Examiners' Brief pp. 31-32. Both involve simply appellate court affirmances of decisions below granting dismissals, under circumstances bearing no relation to the instant case.

It is, however, clear that there is no basis for modification under Rule 60. The only conceivably applicable provision is Rule 60(b)(5)'s authorization of relief if "it is no longer equitable that the judgment should have prospective application...."  
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32/ Rule 60(b)(5), also provides for relief if "a prior judgment upon which it is based has been reversed or otherwise vacated...." The Examiners' argument appears designed to cast the Chance Final Judgment within this framework. Thus they claim that it should be vacated because it was "based upon" the prior preliminary injunction decisions which they argue were effectively "reversed" by Davis. As demonstrated supra Arg. IB(1) those decisions are entirely consistent with Davis. But this provision of F.R.Civ.P. 60(b)(5) is in any event inapposite. It applies only to judgments directly based on a prior judgment "in the sense of res judicata or collateral estoppel. It does not apply merely because a case relied on as precedent by the court in rendering the present judgment has since been reversed." 11 WRIGHT & MILLER §2863 at 204. See also id. at 203 and n. 94, 204 n. 95. See also 7 Moore, Federal Practice ¶60.26(3) at 825:

[W]hile 60(b)(5) authorizes relief from a judgment on the ground that a prior judgment upon which it is based has been reversed or otherwise vacated, it does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding. (emphasis added)

See also Wallace Clark & Co. v. Acheson Industries, Inc., 394 F. Supp. 393, 395 n.4 (S.D.N.Y. 1975), aff'd, 532 F.2d 846 (2d Cir. 1976); Loucke v. United States, 21 F.R.D. 305, 307 (S.D.N.Y. 1957); Lubben v. Selective Service System Local Bd. No. 27, 453 F.2d 645, 650 (1st Cir. 1972); Title v. United States, 263 F.2d 28, 31 (9th Cir. 1959), cert. denied, 359 U.S. 989 (1959); Collins v. City of Wichita, 254 F.2d 837 (10th Cir. 1958).

Rule 60(b)(6) is designed to provide relief in cases of extraordinary injustice not covered by the other provisions of 60(b) and has no applicability here. 11 WRIGHT & MILLER, Federal Practice and Procedure (1973) [hereinafter WRIGHT & MILLER] §2864 at 219 and n. 44. See, e.g., Ackermann v. United States, 340 U.S. 193, 198, 200, 202 (1950); Rineri v. News Syndicate Co., 385 F.2d 818, 822 (2d Cir. 1967) (Kaufman, J.); United States v. Kerahalias, 205 F.2d 331 (2d Cir. 1953) (Hand, J. describing the "extremely meagre" scope of 60(b)(6)); Loucke v. (footnote continued next page)

This provision is very restrictively interpreted where defendants ask for modification to soften or eliminate injunctive restraints to which they are subject, as opposed to situations where modification is requested to further the remedial purposes of an earlier decree.<sup>33/</sup> Where defendants are asking to be relieved from an injunction, the issue is whether changed law or facts have transformed that injunction into an "instrument of wrong," United States v. Swift, 286 U.S. 106, 115 (1932). In the Swift case, whose holding Rule 60(b)(5) was designed to incorporate, the Supreme Court stated:

The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

286 U.S. at 119.

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(footnote continued)

United States, 21 F.R.D. 305, 308 (S.D.N.Y. 1957) ("resort to the rule in order to obtain relief from a judgment is not justified merely because the judgment is erroneous or because the decisional law has been changed by a subsequent ruling.")

33/ "These restrictions do not apply if, rather than defendant seeking relief from a judgment, it is plaintiff who asks to have it modified on the ground that it has not carried out its intended effect." 11 WRIGHT & MILLER §2863 at 208 n.7, citing United States v. United Shoe Mach. Corp., 391 U.S. 244 (1968). See pp. 63-64, infra. This difference is significant in analyzing the cases cited by the Examiners in support of their Argument II. As noted infra pp. 64-65, all those cases involved unsuccessful attempts by defendants to escape restraints imposed on them. They all demonstrate the impropriety of vacating the 1973 Judgment. However they have no bearing on the propriety of the 1976 modification of the 1975 order, since that was designed to further the remedial purposes of the court's previous orders.

And in Humble Oil & Refining Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir. 1969), the court made it clear that under Swift those subject to an injunction had a very heavy burden to satisfy to justify modification:

Placed in other words, this means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movants' task is to provide close to an unanswerable case.

The leading case exemplifying appropriate application of this doctrine where, as here, a change in the law is alleged as grounds for modification, is Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. (59 U.S.) 421 (1856). There a prior decree had found a bridge an unlawful obstruction to commerce and ordered its removal. Subsequently Congress passed a law declaring the bridge lawful. The Court held that while defendants remained liable for costs, the injunction requiring removal of the bridge should be modified since the bridge was now lawful. The two cases relied on by the Examiners as demonstrating that a change in the law can justify modification of a consent decree (Examiners' Brief at 25-27) are comparable. In both those cases changes in law meant that the injunctions at issue either prohibited conduct that a subsequent statute had declared lawful, or mandated conduct that was in direct conflict with the purpose of the applicable statute, and accordingly subjected defendants to unjust

<sup>34/</sup> hardship. It is clear that the mere fact that the law on which a judgment is based may change subsequently does not warrant modification under Rule 60(b)(5) unless the change means that the prospective injunctive relief at issue results in the kind of

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<sup>34/</sup> Thus in System Federation No. 91 v. Wright, 364 U.S. 642 (1961), the consent decree at issue enjoined the defendant union from discriminating against the plaintiff employees for refusal to join the union. At the time the decree was entered, 1945, the Railway Labor Act effectively prohibited such discrimination since it prohibited a union shop. Subsequently the Railway Labor Act was amended to permit a union shop. At issue was the union's motion to modify the consent decree to permit it to take advantage of the statutory change. The Court concluded that the injunction here had become an "instrument of wrong":

That provision was well enough under the earlier Railway Labor Act, but to continue it after the 1951 amendment would be to render protection in no way authorized by the needs of safeguarding statutory rights at the expense of a privilege denied and deniable to no other union. (emphasis added)

364 U.S. at 648.

...[J]ust as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives....The court must be free to continue to further the objectives of that Act when its provisions are amended. The parties have no power to require of the court continuing enforcement of rights the statute no longer gives. (emphasis added)

364 U.S. at 651-52

The other case relied on by the Examiners is Theriault v. Smith, 519 F.2d 809 (1st Cir. 1975); 523 F.2d 601 (1st Cir. 1975). Theriault involved a consent decree which was entered in reliance on a recent decision by the First Circuit interpreting statutory language governing AFDC benefits. The decision relied on was subsequently vacated. The decree provided that the defendants would "pursuant to 42 U.S.C. §602(a)(10) and 42 U.S.C. 606(a) grant AFDC benefits...to otherwise eligible women...on behalf of their unborn children." See 523 F.2d at 602. Since the statute relied on in the decree itself had subsequent to the decree been conclusively interpreted as not authorizing such benefits, vacating the consent decree was clearly appropriate. Otherwise the state would have been forced to pay benefits in violation of the purpose of the decree and the applicable statute.

injustice and oppression described in these cases. <sup>35/</sup> The kind of change in the law that would, under these cases, make the 1973 Judgment subject to modification, would be passage by Congress of a statute permitting public employers to administer examinations that were racially discriminatory and non job-related. It could then be argued that it was "unjust" to prohibit the Examiners from giving such examinations when all other public employers could.

Davis cannot possibly be construed to make an injunction prohibiting the Examiners from administering their old examination system or any new system without court approval, in any way inequitable or oppressive. As indicated supra the decision enjoining the old system was upheld by this Court under standards consistent with Davis. Moreover the significant change in the law since this Court's 1972 decision is the passage of Title VII which clearly bars administration of the enjoined system. <sup>36/</sup> Insofar as

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<sup>35/</sup> See, e.g., Lubben v. Selective Service System Local Bd. No. 27, 453 F.2d 645 (1st Cir. 1972). In Lubben the judgment became final when the government stipulated to a dismissal of its appeal. Shortly thereafter the Supreme Court reversed the precedents for the Lubben decision and the government moved to vacate the Lubben injunction. The motion to vacate was made less than three months after the judgment had been entered but the Court of Appeals held the motion properly denied:

The government has not met its burden of demonstrating that inequity results from continued enforcement of the injunction.... The [Supreme Court] decisions were not such subsequent events as to render continued application of the injunction inequitable.

453 F.2d at 651

<sup>36/</sup>

The Examiners' argument clearly constitutes an attack on the validity of the Consent Judgment itself. Their only possible argument as to why continuation of the injunction would be inequitable is the alleged invalidity of the Consent Judgment itself. But it is clear that modification of a final judgment cannot be permitted where it would involve a reassessment or reopening of the issues resolved by that judgment.  
(footnote continued next page)

prospective application of injunctive relief is concerned -- the only issue open under Rule 60(b)(5) -- there is no conceivable injustice or hardship and oppression involved in continuing an injunction that simply prohibits administration of an unlawful system, and requires court approval of any proposed new system <sup>37/</sup> to ensure that it will be lawful.

--- The requirements for relieving defendants of the constraints imposed by a final decree are especially stringent where, as here, the decree was entered by consent and extensive action has been taken in reliance on it, including action giving defendants the benefits of their bargain.

The fact that the 1973 Final Judgment was entered on consent means that a court should be additionally reluctant to

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(footnote continued)

See, e.g., 11 WRIGHT & MILLER §2863 at 206-07; (Rule 60(b)(5) "does not allow relitigation of issues that have been resolved by the judgment. Instead it refers to some change in conditions that makes continued enforcement inequitable."); Swift, supra p. 36, 286 U.S. at 119 ("The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting.")

37/ See, e.g., SEC v. Thermodynamics, Inc., 319 F.Supp. 1380 (D. Colo. 1970), aff'd, 464 F.2d 457 (10th Cir. 1972), cert. denied, 410 U.S. 927 (1973) ("...the defendant has merely been told to do what the law requires be done, and that is no hardship" 319 F.Supp. at 1384); Wirtz v. Graham Transfer & Storage Co., 322 F.2d 650 (5th Cir. 1963) (injunction mandating obedience to the law "is no hardship", and accordingly decision granting motion to vacate reversed).

The Examiners attempt to argue that there is no need to subject them to an injunction because they have changed their ways. As noted supra pp. 7-10, the need for the injunction is clear. Moreover the Examiners misconceive the applicable standard, attempting to place on plaintiffs and the Board the burden of demonstrating that need. In fact the standard is whether the Examiners can demonstrate not only injustice and oppression, but also that the "dangers, once substantial, have become attenuated to a shadow." See United States v. Swift, quoted supra p. 36. Even demonstrated, long-time compliance with an injunction and with the law is no ground for relief. See, e.g., SEC v. Therodynamics, Inc., supra n. 37, 319 F.Supp. at 1383-84; Wirtz v. Graham Transfer & Storage Co., supra n. 37 .

permit vacation. In United States v. Swift, 189 F.Supp. 885, 905 (D.C.Ill. 1060), aff'd per curiam, 367 U.S. 909 (1961), the court stated that the test regarding the limited circumstances in which injunctive decrees might be modified to remove restraints on defendants had generally been applied "vigorously to deny modification of consent decrees." The Court noted that while consent does not deprive the court of the power to modify where appropriate, it made the task more complicated for reasons which mandate <sup>38/</sup> against modifying such decrees except where absolutely necessary.

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38/ The defendants' mistake in giving consent will remain beyond recall until the decree operates to oppress them in ways unanticipated at its issuance, or until circumstances have so changed that the foundations of the decree, whether adequate or not, are completely undermined. The way of escape is narrow. A broader avenue would destroy the utility of consent decrees. If a composition reached after full and deliberate consideration may be set for nought simply because one of the parties on second thought believes he would have fared better at a trial, the decree becomes nothing more than a continuance or postponement of the trial, and the mutual benefits which induce this form of disposition will be lost.

\* \* \* \* \*  
The defendants can gain nothing from the recital in their stipulations to the decree that they consented upon condition that its entry should not be considered an admission or the decree an adjudication that they had in fact violated any law of the United States. By their consent, they relinquished the right to insist that an offense be proved, and the right to show that no violation had been committed. Having accepted a decree drawn on the theory of a violation of the anti-trust laws, they cannot now vacate or modify the decree on the ground that the theory was unsound.

189 F.Supp. at 906-07.

See also United States v. Armour & Co., 402 U.S. 673, 681-82 (1971).

All the cases cited by the Examiners for the proposition that the district court erred in modifying its 1975 Order approving the Original Plan because the parties had allegedly consented to that plan (Examiners' Arg. II, pp. 39-42), are in direct conflict with their argument that the 1973 Consent Judgment should be

Among these reasons is the fact that where the final judgment is entered by consent there is no direct indication as to the principles of law on which the judgment was based; there is no way of telling what combination of factors entered into the parties' decision to agree to the judgment; and there is no reason to believe that the case would have come out differently had it been litigated even if there has been a change in the law. Accordingly there is nothing unjust in holding the parties to their bargain, and every reason to do so. Thus in the instant case the Examiners' bald contention that the consent judgment was "based upon" the previous grant of preliminary relief (Brief pp. 24-25) simply cannot be supported. As noted above, at the time the consent judgment was agreed to, Title VII had been amended to cover public employers. Moreover the composition of the Board of Examiners had changed radically resulting in a new majority consisting of two new provisional members appointed by the Chancellor, together with the Chancellor (a voting member of the Board of Examiners). There is no way for a court to determine to what extent these and other factors entered into the Examiners' decision to agree to the 1973 Consent Judgment.

Courts are particularly reluctant to modify consent decrees where, as here, defendants are seeking to escape from a

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(footnote continued)

modified so as to release them from any obligation under it. In all of these cases the courts refused to allow defendants to escape restraints embodied in consent judgments, noting that stringent standards were applicable to attempts at modification under these circumstances. These cases provide no support for the Examiners' Argument II, for the reasons set forth infra pp. 64-65.

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bargain from which they have reaped certain benefits. The 1973 Final Consent Judgment provided that persons on lists resulting from the Examiners' old examinations would have an opportunity to be licensed and granted permanent appointments. (¶III A and B, I-A-253a) Had the case gone to trial and plaintiffs prevailed, these lists would have been presumptively invalid. The Examiners now seek to retain the benefits of their bargain by arguing that the persons who obtained licenses and jobs from these lists should retain same, but that plaintiffs should lose any form of restraint over the Examiners' conduct of unlawful examinations. <sup>40/</sup>

## II

### THE DISTRICT COURT'S 1976 ORDER MODIFYING ITS 1975 ORDER AND APPROVING THE DEFENDANT BOARD OF EDUCATION'S MODIFIED PLAN FOR ESTABLISHMENT OF A PERMANENT SUPERVISORY SELECTION SYSTEM MUST BE AFFIRMED

Both the 1975 Order and the 1976 Order modifying it involved simply the nature of the new supervisory selection system to be introduced as a result of the 1973 Final Judgment. Thus the

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<sup>39/</sup> See, e.g., United States v. Lucky Lager Brewing Co. of San Francisco, 209 F.Supp. 665, 668 (D.C.Utah 1962), noting "the impropriety of merely relieving a party from the foreseeable detrimental consequences of its consent, after it has enjoyed or speculated upon its favorable consequences or possibilities by avoiding the litigation and the hazards of a less favorable outcome...."

<sup>40/</sup> The fact that significant actions have been taken in reliance on a judgment is itself strong reason to refuse a motion for modification. 11 WRIGHT & MILLER §2857 at 161 and n. 86, 162 and n. 88.

issue on appeal relates only to the details of relief, a matter clearly subject to the broad discretion of the district court, and one that should be "almost the last to attract appellate intervention."<sup>41/</sup> Here Judge Pollack's decision clearly constituted an appropriate exercise of discretion.

The Modified Plan approved in the order here on appeal provides for a two-step examination system, (See I-C-950-58a; see generally pp. 21-23, supra.) At Step 1 candidates are to be evaluated by the Examiners to determine whether they satisfy certain objective criteria established by the Board of Education.<sup>42/</sup> Candidates who satisfy the Step 1 evaluation are eligible to serve as

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41/ Vulcan Society et al. v. Civil Service Commission et al.,  
490 F.2d 387, 399 (2d Cir. 1973).

42/ See generally Modified Plan at I-C-951-52a:

The Board of Examiners will determine candidates' compliance with training, experience and other requirements established by the Chancellor pursuant to State Law. This examination, an unassembled examination to be developed and administered by the Board of Examiners, will consist of a review, verification and analysis of record.

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Candidates will also be required to participate in a written essay examination developed by the Board of Examiners and administered under proctored examination conditions by the Board of Examiners. The essay will be designed to demonstrate skills in written expression about matters relating to the position for which application is made, and the Board of Examiners will evaluate and comment on the candidate's written communication skills.

The Board of Examiners will develop profiles of each candidate on the eligible list. The profile will contain the candidate's record and written essay, and the Board's reviews and analyses thereof. These profiles shall be made available to all appointing authorities to which applicants wish to apply for positions.

supervisors on a provisional basis. After one year's provisional service they are subject to the Step 2 evaluation to determine whether they satisfy the criterion of successful performance. This evaluation is again left to the Examiners, pursuant to the change in the plan ordered by Judge Pollack. Only those candidates who successfully complete Step 2 obtain licenses and are eligible for permanent appointment.<sup>43/</sup>

The Examiners contend that Judge Pollack's order approving the Modified Plan must be reversed primarily because: (1) the 1975 Original Plan constituted relief entered as part of a consent judgment and the requirements for modifying such a judgment were not met; and (2) the Modified Plan contravened state law.

In considering the Examiners' arguments two points must be kept in mind. First they ignore entirely what is key to an understanding of the 1976 modification -- that it represents an agreement between plaintiffs and the chief defendant in this case, the Board of Education.

Secondly, the Examiners' description of the Modified Plan is a complete distortion. They ignore entirely the existence

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See generally Modified Plan at I-C-952-53a:

These [on-the-job-performance] evaluations will assess the candidates' performance in terms of the essential duties of the job as determined by the Chancellor pursuant to his authority under Section 2554(2) of the Education Law. Upon completion of on-the-job evaluations, the Board of Examiners shall certify to the Board of Education whether or not candidates have met the performance requirements. Applicants who meet such requirements will be issued permanent licenses.

of Step 2 on-the-job performance evaluations -- the crucial aspect of the new examination process. And they make no reference to the fact that Judge Pollack amended the plan initially proposed by the Board of Education to ensure that the Examiners had full power to design and administer the Step 2 evaluations so that, as amended, the Modified Plan is virtually identical to the interim licensing system upheld by this Court in the 1974 appeal as satisfying state law requirements. See Examiners' Brief pp. 35, 66, 67-68. Compare pp. 21-23 supra.

The case described by the Examiners bears no resemblance to the case before the Court.

- A. The Court had no Choice but to Approve the Modified Plan Since It had been Proposed by the Defendant Board of Education in the Exercise of Its Plenary Power over the City School System, and Agreed to by Plaintiffs

The Examiners' entire argument reads as if the Court had ordered defendants to develop a certain kind of examination system. What is crucial here is that neither the 1975 nor the 1976 Orders mandate anything. They simply approve systems proposed by defendants, and "authorize" them to implement those systems.<sup>44/</sup>

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<sup>44</sup> Thus the 1975 Order reads:

[The Original Plan]...is approved as herein modified, and...defendants are permitted and authorized to develop examinations for supervisory positions...in accordance with that Plan. (emphasis added)  
(I-B-509a)

The 1976 Order similarly reads:

[The Modified Plan]...is approved as herein modified, and...defendants are permitted and authorized to develop examinations for supervisory positions...in accordance with said Modified Plan. (emphasis added)  
(I-C-948-49a)

And both systems were proposed by defendant Board of Education.

Clearly the Court had no obligation to force the Board of Education to stick to its 1975 Original Plan unless that was necessary to ensure that plaintiffs were provided the relief to which they were entitled under the 1973 Judgment. Given plaintiffs' consent to the Modified Plan the Court had no choice but to approve it, so long as the Board of Education had authority to propose it.

That authority cannot be questioned. The Board of Education has plenary power over the administration of the City school system.<sup>45/</sup> Included within that power is the power to define the jobs of all school supervisors, and to define the qualifications that determine which supervisory candidates shall be selected. The Board of Examiners is a subordinate body, under the control and administration of the Board of Education.<sup>46/</sup> The

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<sup>45/</sup> The Board of Education is required by law to "determine all policies of the city district," N.Y.Educ.Law §2590-a(1). It was previously described by this Court as "the body entrusted with the general management and control of educational affairs in the New York City School District. N.Y.Educ.Law §2552." 496 F.2d at 822 n.3 (1974). On the powers of the Board of Education see generally Christen Aff. I-B-591a, 599-600a (¶¶46-49).

<sup>46/</sup> The Board of Examiners was previously described by this Court as "the professional examining arm of the Board of Education..." 496 F.2d at 822 n.3 (1974).

The State Commissioner of Education has described the relationship between the two boards as follows:

The board of examiners of the city school district of New York is not an independent body. It exists as a part of the educational system of such district. The jurisdiction of the board of education and of the superintendent of schools extends over it as over every other board or bureau of the system, subject only to

(footnote continued next page)

Examiners have no separate budget and are entirely dependent on the Board of Education for funding. The function is simply to administer tests when required by the Chancellor (who is responsible to the Board of Education), to determine whether candidates satisfy the qualifications established by the Board. See generally pp. 54-55 infra.

The Board of Education clearly had the power and responsibility under state law to modify the Original Plan so as to produce a supervisory selection system that it had concluded was better suited to the needs of the City's schools and capable of producing more qualified supervisors. And it had an obligation to modify the Original Plan when it concluded that it was not likely to produce a nondiscriminatory and job related system.

Even if plaintiffs had consented to entry of the order approving the Original Plan, the Board had no obligation to adhere

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(footnote continued)

the exclusive power and duty conferred by statute in the conduct of examinations and the preparation of eligible lists.

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The board of education may create such positions as may be necessary to enable the board of examiners to perform the duties imposed upon it. The employees of the board are to be appointed in the same manner as other employees of the educational system of the district and their compensation is to be fixed by the board of education. Such employees are subject to the supervisory control of the superintendent of schools in the same manner as other employees of the system.

Matter of the Jurisdiction of the  
Board of Examiners, 25 State Dept.  
Rep. 275, 285 (1921).

to that plan so long as plaintiffs agreed to the Modified Plan, as they did.

Plaintiffs' consent to the Modified Plan left the court with virtually no choice but to approve it. The key reason that the court's approval was required was to protect plaintiffs' rights under the 1973 Consent Judgment. Absent this Judgment the Board of Education would have been free to implement whatever new system it found appropriate.

The only other appropriate area of inquiry for the court was into the relationship between the Board of Education and its subordinate agency, the Examiners, because of the Examiners' protest against implementation of the Modified Plan. The court made that inquiry, satisfied itself that the Board of Education was properly exercising its powers under state law and, in an excess of caution, insisted that the plan proposed by the Board be amended to ensure that the Examiners' powers under state law to administer tests were fully protected. As so amended the Modified Plan clearly protects all cognizable rights of the Examiners.

See pp. 51-59 infra.

Under these circumstances it would have been an abuse of discretion for the court to force the Board of Education to implement the Original Plan. Absent some overriding necessity not present here, a federal court has no business telling a local Board of Education which of many different permissible supervisory selection systems it should adopt.

An analogous issue was presented to the New York State Court of Appeals in Council of Supervisory Ass'n's of Public

Schools of New York City v. Board of Education, 23 N.Y.2d 458, 297 N.Y.S.2d 547 (1969). At issue there was the legality of the Board of Education's establishment of Demonstration School Principalships as new positions, and its appointment to these positions of persons who had not passed the Examiners' tests for regular school principalships. The Board of Education's action was based on its determination that the Examiners' traditional tests did not test for qualities essential to running schools under a decentralized system.

New York's highest court upheld the Board's action against a claim that it was in violation of the merit and fitness selection system. The court made it clear that the Board had the power to define quite specifically the qualities it wanted the Examiners to test for, and to decide whether or not tests conducted by the Examiners satisfied its needs.<sup>47/</sup> And the court also made it clear that the Board of Education was entitled to

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It was the board's judgment that the persons on the present principal list had not been examined for this added experience element in administration and hence the new position should be established with additional tests and standards for appointment.

297 N.Y.S.2d at 553

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The skills sought...for the position,...which will be tested in competitive examination for permanent appointment, as explained by Alfred Giardino, then president of the Board of Education, involve a "knowledge and relationship with disadvantaged communities, the cultural level there, the means and methods of securing increased parental involvement, the ability to stimulate them and the community to engage in a broader based educational project".

297 N.Y.S.2d at 554-55.

great deference in such matters:

...the board, as a high-ranking and responsible public agency in charge of one of the world's largest educational systems, is entitled, as a minimum, to the presumption that its official acts are lawful and are honestly motivated.

297 N.Y.S.2d at 554.

A federal court should be if anything more reluctant to interfere with the Board's actions.

--The Examiners' objections to the legality of the Modified Plan are without merit

(1) State law

As noted above, the Board of Education is entitled to a strong presumption that its official acts are lawful, and a federal court should be reluctant to interfere with its relationship with its subordinate agency, the Examiners. Nonetheless, since the Examiners deal at some length with their claim that the Modified Plan violates state law, we will address that issue.

Judge Pollack carefully considered the Examiners' arguments regarding state law and ordered that the Board of Education's proposed Modified Plan be amended to provide the Examiners their full powers under state law.<sup>48</sup>

As amended, the Modified Plan was identical in all relevant respects to the interim examination system upheld on the

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<sup>48</sup> See his decision and comments on reargument, quoted supra p. 22. See also I-C-929-30a; see generally I-C-867-943a.

1974 appeal in this case as satisfying state law requirements. 496 F.2d 820 (1974). That decision constitutes the law of the case and disposes of all arguments regarding the alleged illegality of the Modified Plan. Significantly, it is nowhere discussed in the Examiners' brief.

At issue on that appeal was the legality of the interim examination system established by the 1973 Consent Judgment. That system provided for the provisional appointment as supervisors of persons who satisfied education and experience criteria established by the Board of Education. Decisions regarding licensure and permanent appointment were to be made on the basis of an evaluation by the Examiners, in conjunction with the appointing authority and pursuant to criteria established by the appointing authority, of the candidates' on-the-job performance during their <sup>49/</sup> provisional appointments. <sup>496 F.2d at 823, 824.</sup> The system called for by the Modified Plan approved by Judge Pollack is <sup>50/</sup> virtually identical. See pp.44-45, supra. Indeed Judge

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49/ I-A-250a, 253a, 254-55a. Parallel provisions were contained in the modified preliminary injunction entered in 1973 against the Board of Education. I-A-260a, 261-63a.

50/ The only significant difference is that the Examiners play a greater role than in the interim plan. Thus in Step 1 of the Modified Plan they determine whether the criteria established by the Board of Education are met through an "unassembled examination" procedure, administer a written test designed to determine skills in written expression, and prepare evaluative profiles of the candidates for use by the community boards in making provisional appointments. (I-C-951-52a) And the Step 2 on-the-job performance evaluations are to be conducted pursuant to whatever procedures the Examiners determine appropriate in assessing performance ability. (I-C-952-53a) The requirement that the Examiners conduct these evaluations "in conjunction with the appointing authority" contained in the interim system (I-A-254a) has been eliminated.

Pollack specifically noted that in amending the Modified Plan to give the Examiners full examining authority at Step 2, he had made the Plan comparable to the interim system upheld by this Court in its 1974 decision.<sup>51/</sup>

In that decision this Court found that the interim system satisfied state law requirements, specifically noting that on-the-job performance evaluations constituted fully adequate examinations, and distinguishing the Nyquist decision, on which the Examiners primarily rely. 496 F.2d at 823-24 and n.10. Thus this Court stated:

As to the legality of the preliminary injunction under state law, the order does not authorize the permanent licensing of school supervisors without any examination. If it did, it would probably run afoul of the decision of the New York Court of Appeals in Board of Educ v. Nyquist, 31 N.Y.2d 468, 341 N.Y.S.2d 441, 493 N.E.2d 819 (1973).... In Nyquist...there was a grant of a permanent license to an acting supervisor without any examination. Here, the settlement agreement contemplates an interim system of appointment which includes a full examination. 496 F.2d at 823-24.

The "full examination" referred to was the on-the-job evaluation provided for by the interim system. (This Court's major concern in 1974 was that it was dealing with an interim system, and a preliminary injunction rather than final judgment insofar as the

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51/ Thus Judge Pollack stated:

The Second Circuit has already held in this case under 496 Fed 2nd that...on-the-job evaluations by the Board of Examiners, which is really Step 2 in the modification, satisfy the requirements of the New York State Education Law and the Constitution regarding the role of the examiners in administering objective examinations.

I-C-942a.

Board of Education was concerned. These issues are no longer problems.)

Independent analysis of state law clearly supports the conclusion that the Modified Plan appropriately divides responsibility for the development and administration of a supervisory selection system between the Board of Education and the Examiners.

The Board of Education has exclusive authority under state law to determine the qualifications for which it wants supervisors tested.<sup>52/</sup> The Examiners' function, once the Board has prescribed qualifications, is simply "to determine whether applicants for licenses possess such qualifications."<sup>53/</sup>

Moreover, the State Commissioner of Education has held that the power to prescribe qualifications includes the power to designate the general subjects to be covered by licensing

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52/ State law provides that the Board has responsibility to "designate...the kinds and grades of licenses" required for positions in the educational service, "together with the academic and professional qualifications required for each kind or grade of license." N.Y.Educ. Law §2573(10) (Supp. 1975-76).

53/ Matter of the Jurisdiction of the Board of Examiners, 25 State Dept. Rep. 275, 282 (1921) (hereinafter the Jurisdiction Case). See also Matter of Appeal of the Board of Examiners, 73 State Dept. Rep. 20, 21 (1952).

The authorities relied on by the Examiners are entirely consistent with this analysis. They indicate simply that the Examiners have control over the limited task of ascertaining whether candidates possess those qualifications prescribed by the Board of Education. Examiners' Brief at 62-63. Moreover the Investigation Case relied on by the Examiners and reproduced as Addendum B of their brief is an unpublished memorandum of questionable relevance, given its genesis in a unique historical situation over fifty years ago, involving issues totally unrelated to the instant case. They are described in Matter of Appeal of Certain Members of the Board of Examiners, 34 State Dept. Rep. 183 (1926).

54/  
examinations.

In the Modified Plan the Board of Education establishes the qualifications for which the Examiners are to test -- objective experience and educational qualifications at Step 1, and ability to perform as indicated by actual on-the-job performance at Step 2. This is fully within the Board's power to prescribe qualifications and its corollary power to designate the general subjects of examinations to screen for those qualifications. It in no way invades the role of the Examiners, who are left with full power to design tests to measure the prescribed qualifications. The Examiners have no power under state law to insist on imposing their own qualifications as their request for implementation of the Original Plan would do.

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54/ The power to designate the academic and professional qualifications required of an applicant for a license must include the power to prescribe the tests to be applied upon examinations of applicants for licenses. The contention...that the power to designate such professional and academic qualifications includes the power to designate the subjects to be covered by examinations of applicants for licenses seems reasonable. The board of superintendents may, therefore,...declare that the examinations leading to the issuance of certain licenses should be in certain specified subjects, for in no other way may the board of superintendents effectually exercise the power conferred of designating the academic and professional qualifications of applicants.

Jurisdiction Case at 286-87

In this case the Commissioner held that the initial power to designate subjects of examinations lay with the superintendent of schools and the board of superintendents, as the executive authorities in the educational system, and the Board of Education designated subjects on their recommendation. Id. at 289. Since that time, the city superintendent's office has been abolished and its powers transferred to the Chancellor and the Board. The authority to prescribe qualifications and the subjects of examinations now rests with them.

Step 1 of the Modified Plan changes the nature of the examination needed from that provided by the Original Plan, because the Board of Education has changed the nature of the qualifications for which it wants supervisors tested. Under the Original Plan a subjective set of qualifications required a fairly elaborate examination system. In the Modified Plan the Board has established objective qualifications which can be measured without an elaborate examination process. The procedure called for in Step 1 is what has traditionally been called an "unassembled examination" in New York. It has been used by the Examiners in the past, and is currently used by the New York Civil Service Commission in many situations.<sup>55/</sup> It has been repeatedly upheld by New York courts as satisfying state constitutional and statutory requirements for "competitive" examinations, designed to produce lists of candidates ranked in order of relative competence,<sup>56/</sup> with appointments made from the top of the list only. It

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<sup>55/</sup> See Christen Aff. ¶33 at I-C-802a.

<sup>56/</sup> Unassembled examinations have been upheld in every state court decision dealing with their legality: Aitman v. Lang, 44 Misc.2d 715, 255 N.Y.S.2d 284, 287 (Sup.Ct.N.Y.Co.), aff'd mem., 23 A.D.2d 820, 259 N.Y.S.2d 779 (1st Dept.), aff'd mem., 17 N.Y.2d 464, 266 N.Y.S.2d 975, 214 N.E.2d 157 (1965); and Matter of Young v. Trussel, 42 Misc.2d 108, 247 N.Y.S.2d 603 (1964). Aitman v. Lang upheld use of an "unassembled examination" for the competitive position of probation officer, defining this "method of testing" as "an evaluation of training and experience, obvia[ting] the necessity of applicants to assemble at a particular test site, on a day certain, for written or oral examinations." 255 N.Y.S.2d 286. The court noted that the law's requirement of a competitive merit and fitness examination "does not compel a perpetuation of traditional practices of personnel recruitment, such as the use of written or oral tests, which time and circumstances may render unfeasible and ineffective," and "cannot be transformed into a interdict (footnote continued next page)

clearly satisfies the less demanding requirements governing examinations for school supervisors which are by law "qualifying" rather than "competitive", designed to produce eligibility lists of all those satisfying minimum qualifications, with the appointing authority free to choose anyone on the list.<sup>57/</sup> The purpose of a qualifying examination has been described by the New York Court of Appeals as: "merely an assurance that along with personal qualities or associations satisfactory to the appointing officer there shall also be the attainment of some standard of efficiency established as a minimum." Ottinger v. Civil Service Commission, 240 N.Y. 435, 443, 148 N.E. 627, 629 (1925).<sup>58/</sup>

And even if Step 1 did not in itself constitute an adequate examination under state law, Step 2 clearly does, as this Court held on the 1974 appeal. And success in the Step 2 examination of ability to perform, as demonstrated by actual on-the-job performance, is a prerequisite to licensure and permanent appointment under the Modified Plan. The Board of Education's

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(footnote continued)

against innovations such as the technique employed here, which may very well prove to be best or better adapted for the necessary demonstration of fitness and merit." 255 N.Y.S.2d at 287. Young v. Trussel similarly upholds an unassembled examination for the competitive position of psychologist.

57/ N.Y. Educ. Law §2590-j-3(b)(2) (examinations for supervisory positions qualifying rather than competitive).

58/ See also Barnett v. Fields, 196 Misc.2d 339, 92 N.Y.S.2d 117 (Sup.Ct.N.Y.Co. 1949), aff'd mem., 276 App.Div. 903, 94 N.Y.S.2d 904 (1st Dept. 1950), aff'd mem., 301 N.Y. 543, 93 N.E. 346 (1950), in which a sufficient qualifying examination for school supervisors was described as any "reasonable test of merit and fitness."

authority to designate actual ability to perform as a "qualification" for a supervisor cannot seriously be questioned. Nor can the reasonableness of the Board's decision to make on-the-job performance evaluations determinative of licensure, given the difficulty of predicting ability to perform the varied and complex duties of principals and other school supervisors on the basis of some kind of abstract test. The Examiners themselves have in the past often given examinations consisting essentially of performance evaluations. And the New York courts have previously indicated that on-the-job performance evaluations are not only proper under New York law, but may well constitute the best means of measuring actual ability to perform.<sup>59/</sup> Indeed the

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<sup>59/</sup> Thus in Matter of Sloat v. Board of Examiners, 274 N.Y. 367 (1937), the New York Court of Appeals upheld use of an "interview test" and a "teaching test" by the Examiners. The teaching test involved assessment of actual performance in a classroom situation. The Court said:

Indeed, in determining the merits of a substitute teacher and her fitness for appointment to a permanent position, the "teaching test" in the class room would, it is evident, be particularly valuable. The mandate of the Constitution for the ascertainment of merit and fitness, so far as practicable, by competitive examination, may not be transformed into an interdict against the examinations which are best adapted for the demonstration of fitness.

274 N.Y. at 374-73.

(footnote continued next page)

difficulty of devising traditional tests to measure for the kinds of "intangible factors" making for a successful supervisor, recognized by Judge Mansfield at the outset of this litigation,<sup>60/</sup> demonstrates the wisdom of the Board of Education's decision to look to actual performance. See pp. 8-9 and n. 9 supra.

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(footnote continued)

In People ex rel Sweet v. Lyman, 157 N.Y. 368, 377, 381 (1898), the court upheld a probationary period as a legitimate method of testing for merit and fitness under the New York Constitution, and indicated that it was in fact likely to be one of the best methods, given the limitations of traditional civil service examinations. And in Altman v. Lang, supra, n. 56 the court stated:

...the fact remains that any examination given to a candidate, even though competitive, be it written, oral or unassembled, as here, can serve to measure only the candidate's potential ability, unless the examination itself demands actual performance of the specific duties of the subject position.

255 N.Y.S.2d at 289.

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See 330 F.Supp. at 217:

At the outset of the hearings, being inexperienced in the field of examinations generally, we indicated doubt as to whether examinations could be constructed that would be valid for selection of Principals and other supervisory personnel, since we viewed their duties as being executive and complex in nature, with the success of a Principal in a given school depending not so much on his knowledge of duties and educational content of courses given by his subordinates as on such intangible factors as leadership skill, sensitivity to the feelings and attitudes of teachers, parents and children, and ability to articulate, to relate, to organize work, to establish procedures, to promote good community relations, to induce subordinates to accept directions, to work cooperatively, to criticize without creating unnecessary animosity or illwill, to analyze and evaluate administrative problems, to take initiative and promote new programs, and to instill a feeling of confidence.

(2) Federal Law

The only other issue as to the legality of the Modified Plan raised by the Examiners is that this Plan fails to comply with federal law requirements that tests be supported by job analyses. (Brief at pp. 70-73). However this argument simply fails to acknowledge that there is no longer any need for job analyses because there are no longer any preliminary screening tests which preclude possibly qualified persons from obtaining the jobs in question. Step 1 is now an objective evaluation of experience and educational credentials. Such credentials are job-related on their face and have never been and are not now challenged by plaintiffs or any other party as having discriminatory effects. Unless and until such requirements are challenged and actually shown to have discriminatory effects there is no legal requirement that they be supported by job analyses or otherwise validated.<sup>61/</sup> A Federal court has no more business insisting that job analyses be performed for these credential requirements than it would if this action had never been brought. Step 2 likewise has not been challenged by anyone as discriminatory. But even more important, it is absurd to even propose the idea of a job analysis to support Step 2. In Step 2 performance on the actual job is the standard of success. This indeed is the profound strength and value of the Modified Plan. It does away with the

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<sup>61/</sup> See EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607 at 1607.3; Proposed Uniform Guidelines on Employee Selection Procedures, 41 Fed. Reg. 29016, 29017 at §3a (1976).

need to worry if a test is adequately predicting performance abilities. And it does away with the need for burdensome and possibly intractable problems of job analyses for these complex management jobs, by allowing the job itself to be the test. The cases and regulations cited by the Examiners are inapposite because they all deal with situations where a preliminary test was given which denied persons the opportunity to actually prove themselves on the job. Where the job itself is the test, job analysis <sup>62/</sup> is irrelevant.

B. In Any Event, the Court Clearly had Discretion, Pursuant to F.R.Civ.P. 60, to Modify Its 1975 Order Approving the Original Plan and, since the Modified Plan was more likely to serve the Purposes of the 1973 and 1975 Orders, that Discretion was Properly Exercised.

Since the Modified Plan represented an agreement between plaintiffs and the defendant with authority to propose it, the doctrines regarding modification of final orders over the opposition of either plaintiff or defendant are not even applicable, as demonstrated in Arg. II-A above.

Even assuming they were applicable, the district court clearly had the power to modify its 1975 Order under F.R.Civ.P. 60(b)(5). Moreover the court's decision to modify was within its "wide discretion". System Fed'n No. 91 v. Wright, 364 U.S. 642, 648 (1961).

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<sup>62/</sup> Cf. Cooper and Sobel, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1642 (1969).

The Examiners argue that the court below had no power to grant modification because it imposed substantial new burdens on them without their consent (Brief pp. 37-40).

This argument has no basis in fact. The two plans are quite similar in nature, the only difference being that under the Modified Plan the Examiners are no longer required to conduct the elaborate Step 1 tests called for in the Original Plan.

Moreover the Examiners have no support for the "doctrine" they cite to the effect that "consent decrees cannot be modified to impose new restrictions unless all parties agree to such a change."<sup>63/</sup>

In fact the law is clear that final decrees can be modified whether or not entered by consent,<sup>64/</sup> and whether or not they impose new restrictions.<sup>65/</sup> The power to modify, incorporated in

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63/ Examiners' Brief p. 38. The cases they cite at pp. 37-39 stand simply for the proposition that consent judgments are final (the Butler and Steingruber cases), or that under certain circumstances not here applicable courts should not grant modification. Thus in Ford Motor Co. v. United States, 335 U.S. 303 (1948), modification was found inappropriate because the government was trying to extend the burdens on a defendant without providing that defendant the benefits of its bargain and the defendant was suffering clear injustice. In the Savannah Cotton and Shubert cases, modification was denied because defendants had failed to satisfy the stringent standards applicable where defendants are trying to escape from injunctive restraints plaintiffs are trying to maintain. Neither case is applicable here. See pp. 63-65 infra.

64/ See generally 11 WRIGHT & MILLER §2961 at 611 and cases cited n. 78; see, e.g., System Federation v. Wright, 364 U.S. 642, 651 (1961) ("The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction...").

65/ See, e.g., United States v. United Shoe Mach. Corp., infra pp. 63-64.

F.R.Civ.P. 60(b)(5), stems from an equity court's continuing responsibility over its decrees -- here not only the 1975 but also the underlying 1973 decree.<sup>66/</sup> Here the requirements applicable to the 1976 modification were clearly met.<sup>67/</sup>

(1) The stringent requirements for modification of certain final decrees were not applicable here

(a) The modification here was designed to further rather than frustrate the purposes of the earlier court orders

While the standards governing modification are restrictive when defendants are attempting to escape their obligations under an injunctive decree, they are not when modification is sought to further the remedial purposes of that decree. 11 WRIGHT & MILLER §2863 at 208 n. 7. See p. 36 and n. 33 supra.

In the United Shoe case the Supreme Court made clear the different standards applicable in these different situations. There the government sought modification to impose more stringent limitations on defendants. The district court had denied modification saying its power to modify was limited to cases involving

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<sup>66/</sup> See generally 11 WRIGHT & MILLER §§2863, 2961.

<sup>67/</sup> The 1975 order itself constituted a modification of the 1973 Final Judgment (I-B-506-09a). The 1975 order specifically notes the court's "continuing jurisdiction pursuant to Paragraph XIV of the Final Judgment of July 12, 1973" (I-B-511a), specifies that the Original Plan's requirements are "[f]or the purpose of determining or securing compliance with the Final Judgment" (I-B-535a, 537a), and that the provisions of the Final Judgment "shall continue in full force and effect...." (I-B-509a). And ¶XIV of the 1973 Final Judgment provided for continuing jurisdiction for purposes of "modification...or otherwise for the construction or enforcement of the final judgment." (I-A-259a).

"(1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions." These were the factors that the Supreme Court had said governed the modification at issue in the case of United States v. Swift & Co., 286 U.S. 106 (1932), relied on here by the Examiners (Brief pp. 40-42). The Supreme Court explained in United Shoe that this Swift doctrine meant simply that a decree may not be "changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree... have not been fully achieved." United States v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968). In United Shoe the Court made it clear that the situation was entirely different where modification was designed to achieve those purposes: "The present case is the obverse of the situation in Swift if the Government's allegations are proved.... In Swift, the defendants sought relief not to achieve the purposes of the provisions of the decree, but to escape their impact..." 391 U.S. at 249. And the Court held that modification should be granted if appropriate to ensure that the original purposes of the injunction were being fulfilled in all respects. 391 U.S. at 247, 251-52.

Every case cited by the Examiners as supporting the application of "stringent" standards to a modification request (Brief pp. 40-42) involved a defendant trying to eliminate or reduce restraints that plaintiffs still felt were necessary. These standards are inapplicable where, as here, the defendant Board of Education is not trying to escape restraints sought by the plaintiffs but, rather, to further the remedial purposes of the earlier

decrees by establishing a nondiscriminatory and job-related selection system.

- (b) The 1975 Order approving the Original Plan was not entered by consent and even if it had been, its modification involved no problems of fairness to the Examiners.

The Examiners' entire argument on the modification issue is based on the faulty premise that the Original Plan was part of a consent judgment. As demonstrated supra pp. 17-19 it was not.

Even had it been, the 1976 modification involved none of the problems of fairness that make courts reluctant to modify certain consent decrees. See pp. 42-43 supra. The 1975 Order was never implemented in any significant way. The only step taken under it was the development of invalid job analyses by the Board of Education. Plaintiffs therefore never gained any benefits from it as alleged by the Examiners (Brief pp. 73-75). (The Examiners try to confuse the issue by combining discussion of the 1973 Judgment with the 1975 Order. Plaintiffs did obtain certain benefits from the 1973 Judgment as did the Examiners. See p. 43 supra. But that has no bearing on the propriety of modifying the 1975 Order.) Nor did the Examiners give up any of their powers by agreeing to the Original Plan. Had that plan never been approved by the Court, the Board of Education would have been able to move for approval of the Modified Plan pursuant to the 1973 Judgment.

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Accordingly, the stringent requirements for modification applicable to the Examiners' request to vacate the 1973 Judgment are not applicable to the 1976 modification of the 1975 Order.

- (2) The modification here was appropriate since the evidence demonstrated that the Modified Plan was more likely than the Original Plan to produce a nondiscriminatory and job-related selection system.

The Supreme Court stated, in a case relied on by Judge Pollack in the decision below, that equitable orders require "a continuing willingness to apply [the court's] powers and processes on behalf of the party who obtained that equitable relief." System Fed'n No. 91 v. Wright, 364 U.S. 642, 647 (1961). The test, the Court said in another case relied on by Judge Pollack, "is whether the change served to effectuate or to thwart the basic purpose of the original consent decree." Chrysler Corp. v. United States, 316 U.S. 556, 562 (1942). And in United Shoe, supra, the Supreme Court made clear that the issuing court has not only the power but the duty to modify an order for equitable relief if its principal objectives have not been met, and "to prescribe other, and if necessary more definitive, means to achieve the result." 391 U.S. 244, 252 (1968). See generally 11 WRIGHT & MILLER §2961 at 600, 603-04.

Modification can be based on changes in operative facts. And "the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes." King-Seeley Thermos Co. v. Aladdin Indus., Inc., 418 F.2d 31, 35 (2d Cir. 1969). See also Equal Employment Opportunity Comm'n v. United Ass'n of Journeymen

& Apprentices, 438 F.2d 408, 414 (6th Cir. 1971), cert. denied, 404 U.S. 832.

These principles were clearly operative in the instant case.

The 1973 Consent Judgment settled the issue of liability and granted plaintiffs the fundamental right to relief. Its provisions regarding relief were comparable to those that would have been included in a final judgment following an adjudication of liability in a typical employment discrimination case; they were also comparable to, although somewhat more detailed than, the provisions contained in the preliminary injunction which was of course the result of an adjudication. See, pp. 14, 15-16, supra. A key aspect of the remedial relief envisioned by the 1973 Judgment was the development of a new permanent selection system that was nondiscriminatory and job-related. And the stated purpose of the 1975 Original Plan was the development of such a system (I-B-513a).

The Board of Education demonstrated below, on the basis of its experience attempting to implement the Original Plan, that it was not likely to serve the purposes of the 1975 and the 1973 orders -- development of a nondiscriminatory and job-related system -- whereas its proposed Modified Plan was. See pp. 20-21, supra. And the court found that the Modified Plan was in fact better suited to achieve those purposes. See pp. 21-22, supra.

Under these circumstances modification was clearly appropriate.<sup>68/</sup>

C. The Relief Requested by the Examiners Would in no Event be Appropriate -- the Examiners' Motion to "Implement" Cannot be Granted

The Examiners have asked this Court to rule not only that Judge Pollack's approval of the Board of Education's motion to modify be reversed, but also that the Examiners' motion to "implement" the 1975 order be granted. That motion to "implement" in fact constituted a request for radical modification, so as to grant to the Examiners responsibilities delegated under the Original Plan to the Board of Education for the development of job analyses. Those analyses were key to the Original Plan's Step 1 examinations (I-B-513-19a); and the requirement that the Board of Education prepare them was one of the most significant protections contained in that Plan against the Examiners simply continuing to administer a system with flaws substantially

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<sup>68/</sup> The Examiners' argument regarding the court's failure to hold a full evidentiary hearing prior to entry of the 1976 order (Brief pp. 53-56) also is without merit. There is no doctrine such as that relied on by the Examiners. Courts need not hold evidentiary hearings prior to modifying an order but, rather, have discretion to determine the kind of hearing appropriate. See, e.g., Standard Newspapers, Inc. v. King, 375 F.2d 115 (2d Cir. 1967) (per curiam); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 and n. 11 (2d Cir. 1970); Jones v. Jones, 217 F.2d 239 (7th Cir. 1954). Moreover the Examiners not only fail to indicate here how they were prejudiced by the absence of oral testimony, but they never asked below for an opportunity to present such testimony. Rather they chose to proceed by way of affidavit. They are accordingly precluded from objecting to that procedure. Semmes Motors, Inc. v. Ford Motor Co., supra, 429 F.2d at 1205; Jones v. Jones, supra, 217 F.2d at 242 (7th Cir. 1954).

identical to those in the system originally challenged. Turning this responsibility over to the Examiners, ostensibly as a sanction for misconduct by the Board of Education, would therefore have the effect of vitiating the relief won by plaintiffs in this case. Moreover job analyses -- designed to assess the qualifications needed to serve as supervisors -- are by law the responsibility of the Board of Education.<sup>69/</sup> Granting this responsibility to the Examiners would thus give them a freedom from any outside constraint in the development of examinations which they did not have prior to the institution of this suit, and which violates New York law.

Moreover the premise on which the Examiners' motion to "implement" was based is false, since the Board of Education had demonstrated no recalcitrance in complying with the terms of the Original Plan. In fact it was in large part the Board's very efforts to carry out that Plan that resulted in its conclusion the Plan should be modified. The Examiners' complaint is really with the fact that the Board apparently tried to comply with the Plan's requirements that the job analyses be reviewed to determine whether they provided a sound basis for developing valid examinations. Having determined they did not, the Board made a negative decision regarding their acceptability which decision,

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<sup>69/</sup> See N.Y.Educ.Law §2254 (Board of Education's responsibility regarding all positions to "define their duties"); see also N.Y. Educ.Law §2573.10 (Board of Education to "designate...the kind of grades and licenses which shall be required for service...together with the academic and professional qualifications required for each kind of grade or license.")

by the Plan's express requirements, "shall be final." (I-B-517a)

Depriving the Board of Education of its responsibilities under the Original Plan would be warranted only by contumacious defiance of the court's order clearly not present here. This is plain from the two decisions relied on by the Examiners, both of which involved such conduct -- Gautreaux v. Chicago Housing Authority, 402 U.S. 922 (1971), and Wagner v. Warnasch, 156 Tex. 334, 295 S.W.2d 890 (1956). And in neither of those cases did the courts grant the kind of extraordinary relief sought here. Rather they simply established precise deadlines for compliance.

Nor does F.R.Civ.P. 70, on which the Examiners rely, provide any support for the extraordinary relief requested. In providing that, where a party has refused to perform an act mandated by court order, the court may direct performance of the act "by some other person," that rule clearly contemplates appointment of an impartial third person, or a party to whom an express duty is owed (see Wagner v. Warnasch, supra). The Examiners satisfy neither criterion.

The essential purpose of the contempt power and of F.R.Civ.P.70 is to ensure that plaintiffs are provided the relief to which they are entitled under court orders. The Examiners are attempting to twist these remedies so as to vitiate the relief plaintiffs have won in this case.

Finally, the impropriety of the Examiners' motion is demonstrated by their admission that to carry out new job analyses -- or even patch up the old invalid ones which is clearly

their intent -- they would require funds which they could obtain only if the Court would order the Board of Education to turn them over. See I-C-927-28a; Examiners' Brief p. 82. Granting the Examiners' motion to "implement" would involve improper intrusion by the federal courts into local educational affairs.

CONCLUSION

For the reasons stated above, the district court's order approving the Board of Education's Modified Plan for the selection of supervisors must be affirmed.

DATED: New York, New York  
November 19, 1976

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
FOR THE SECOND CIRCUIT

-X

BOSTON M. CHANCE, LOUIS C. MERCADO, et al., :

76-7348

Plaintiffs-Appellees, :

-against- :

THE BOARD OF EXAMINERS, :

AFFIDAVIT  
OF  
SERVICE

Defendant-Appellant, :

-and- :

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK  
and the CHANCELLOR OF THE CITY SCHOOL DISTRICT, :

Defendants-Appellees. :

-X

STATE OF NEW YORK ) ss.:  
COUNTY OF NEW YORK )

PAULINE REINISH, being duly sworn, deposes and says:

1. That she is a secretary in the office of Elizabeth B. DuBois, one of the attorneys for plaintiffs-appellees in the above-captioned action.

2. That on the 19th day of November, 1976, she served two copies of the foregoing Brief of Plaintiffs-Appellees on counsel for both defendant-appellee Board of Education and amicus curiae Council of Supervisors and Administrators of the City of New York, Local 1, SASCO, AFL-CIO in the above-captioned case by depositing them in the United States mail, postage prepaid, addressed to said attorneys at their last known addresses as indicated below:

Corporation Counsel  
Municipal Building  
New York, New York 10007  
Attention: Deborah Rothman

Frankle & Greenwald  
80 Eighth Avenue  
New York, New York 10011  
Attention: Leonard Greenwald, Esq.

Pauline Reinish  
Pauline Reinish

Sworn to before me this  
19th day of November, 1976

Stell Lorin  
Notary Public

STELL LORIN  
Notary Public, State of New York  
No. 31-4630000  
Qualified in New York County  
Commission Expires March 30, 1978

COPY RECEIVED

Date 11/19/76

KALMAN, HAYN, FIERMAN, HAYS & HANDLER

Attended by Board of Examiners